TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 553.

THE NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA *EX REL.* T. F. McCUE, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED JULY 30, 1909.

(21,779.)

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a STATE OF NORTH DAKOTA:

In Supreme Court.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Bill of Exceptions.

The above entitled action came duly on before the above named court without a jury, the respective parties appearing by their counsel, and the issues having been joined upon the pleadings and the same was submitted upon evidence taken before a referee pursuant to the order of the court, which pleadings, orders and evidence were embodied in a "Consolidated Record" which was taken and accepted by the court as a basis for its determination and judgment, which record was as follows:

1 STATE OF NORTH DAKOTA:

In the Supreme Court.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

This proceeding was commenced by filing in the office of the Clerk of the Supreme Court of the State of North Dakota on the 7th day of August, 1907, the following petition and motion:

Petition.

In Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff respectfully shows to this court:

I.

That your petitioner is the duly elected, qualified and acting Attorney General of this state.

II.

That the defendant, the Northern Pacific Railway Company, is a foreign corporation.

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III.

That the defendant owns and operates a main line of railway across the entire state, and also diverse and numerous branch lines extending from the said main line to other places within the state.

IV.

That said defendant is a railway corporation and a common carrier and engaged in this state in the transportation of freight and passengers from one point to another inside the state, and that as such common carrier of freight, it handles and ships large quantities of domestic coal, which coal the said defendant transports from the coal mines located along its line of road to diverse and numerous other stations and localities within this state.

V.

That chapter 51, laws of 1907, which act amended section 4395, Revised Codes of 1905 of this state, is now, and has ever since the first day of July, A. D. 1907, been in full force and effect, which act and law fixes the schedule of rates that defendant shall charge for the transportation of coal within this state. That notwithstanding the fact that the said law so fixes the rates which shall be charged, the defendant has at all times refused, neglected and failed to comply with the terms and provisions of said act, and said defendant has disregarded the schedule of rates provided therein, and has fixed and put in force a schedule of rates for the transportation of coal in this state entirely different and greatly in excess of the rates fixed in said act. That the rates charged by the said defendant, and which it has charged since July 1st, for the transportation of coal as aforesaid, is about thirty-three and one-third (33⅓) per cent more and in excess of the rate provided by the law aforesaid. That by reason of said facts, the defendant is now violating the provisions of said chapter 51, laws of 1907, and it threatens to continue to so violate the same.

VI.

That coal is one of the principal natural products of this state, and is produced in large quantities all through the western portion thereof. The question of the rates charged for the transportation of the same within this state, is a subject in which the entire people and all the citizens of the state are deeply concerned, and it is one of vital interest to all the citizens of this state.

3

VII.

That unless this court assumes jurisdiction and issues an order and injunction to prevent the defendant from charging a higher rate for the transportation of coal than that which is provided for by the laws of this state, the defendant will continue to violate the law and cause the citizens thereof to pay excessive charges for the

transportation of coal, and will thereby continue to work a great hardship on the people of this state as aforesaid.

VIII.

That the plaintiff is without any speedy or other adequate remedy at law.

Wherefore, the plaintiff, the State of North Dakota, through its Attorney General, prays this court that it assume jurisdiction in this case, by an order issued, directed to the defendant, citing it to appear before this honorable court at such time as the court may deem proper, and show cause why an injunction should not issue enjoining the defendant from committing the act complained of in this petition, and enjoining said defendant from charging any higher or greater rate for the transportation of coal than that which is provided by chapter 51, laws of 1907, and that upon the final hearing, a permanent injunction — against said defendant restraining it, its agents and employés within the state, from committing the acts complained of in the foregoing petition.

Dated this 2nd day of August, A. D. 1907.

T. F. McCUE,
Attorney General.

Verification.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

T. F. McCue, being first duly sworn, deposes and says that he is the duly elected, qualified and acting Attorney General of this state; that he has prepared the above and foregoing petition and knows the contents thereof; that the allegations, statements, matters and things therein set forth are true of his own knowledge.

Dated this 2nd day of August, A. D. 1907.

T. F. McCUE.

4 Subscribed and sworn to by the said T. F. McCue before me this 2nd day of August, A. D. 1907.

[SEAL.] EDWIN J. TAYLOR,
Notary Public, North Dakota.

My Commission Expires May 14, 1912.

Motion.

In Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff.
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Now comes T. F. McCue, Attorney General of the State of North Dakota, and moves this honorable court:

I.

For an order granting leave to file the petition, a copy of which is hereto attached, and further moves that this honorable court assume jurisdiction in said cause.

II.

The plaintiff further moves the court for an order to issue directed to the defendant, requiring *them* to be and appear before this honorable court to show cause why an injunction should not issue as prayed for in said petition; that said hearing be fixed for such time and place as this court may deem proper, and in compliance with law.

Dated this 2nd day of August, A. D. 1907.

T. F. McCUE,
Attorney General.

On the 7th day of August, 1907, the following order to show cause was issued:

5 *Order to Show Cause.*

In Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff.
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

T. F. McCue, Attorney General, having presented to this court a properly verified petition, praying for an injunction against the defendant, and citing among other things that the defendant is a railway corporation, engaged in the transportation of freight within this state as a common carrier, and that as such common carrier it transports from one place to another within this state, large quantities of coal, and that the defendant is charging a rate for the transportation of such coal largely in excess of that which is provided by the statutes of this state, and that the defendant threatens to continue to violate said law with reference to the transportation of such coal, and unless enjoined from charging a higher rate than that provided by law, by this court, it will continue to violate the law and charge excessive rates for such transportation.

Said Attorney General having moved this court for leave to file said petition, and for an order to issue as prayed for in said petition.

That leave be, and the same is hereby granted to the Attorney General to file in this court said petition.

It is ordered that the defendant, the Northern Pacific Railway Company, is hereby required to be and appear before this court at the court house in the city of Grand Forks, N. D., on the sixteenth day of September, 1907, at 10 o'clock a. m., and show cause, if any *they have*, why leave should not be granted as prayed for, why this court should not permanently enjoin it from violating the law here-

inbefore referred to and committing the acts complained of as aforesaid.

It is further ordered that a copy of this order, together with a copy of said petition, be served personally on some agent of the defendant in this state, designated by law upon whom service can be made.

Dated this 7th day of August, 1907.

D. E. MORGAN,
Chief Justice of the Supreme Court.

6 On the 17th day of August, 1907, the following return of service of the before mentioned petition, motion and order to show cause was filed:

Sheriff's Return.

In Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

I, D. J. McGillis, sheriff of Burleigh county, North Dakota, do hereby certify and return that I served the attached motion, the attached petition and the attached order in the above entitled action on the Northern Pacific Railway Company, the above named defendant, in Bismarck, in Burleigh county, North Dakota, on the 15th day of August, 1907, by delivering to and leaving with W. J. Payne, personally, the agent of said defendant, designated by law upon whom service can be made, at Bismarck, North Dakota, a true and correct copy of said attached motion, a true and correct copy of said attached petition and a true and correct copy of said attached order, in Bismarck, Burleigh county, North Dakota, on the 15th day of August, 1907.

Dated at Bismarck, North Dakota, August 17, 1907.

D. J. McGILLIS,
Sheriff of Burleigh County, State of North Dakota.

On the 28th day of September, 1907, the defendant herein filed the following return to said order to show cause:

Defendant's Return.

In Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant above named, and in response to the order of this court, dated August 7, 1907, directing it to
7 show cause before this court at the city of Grand Forks on September 16, 1907, at ten o'clock a. m., why leave should not be granted to the Attorney General of this state to file his petition herein and why this court should not take jurisdiction and issue its writ to enjoin this defendant from charging a higher rate for the transportation of coal than that fixed by chapter 51, laws of 1907, "Popular Edition" of laws, page 274, and in pursuance of such order and its further order extending the time for making its return for a period of ten days, sets forth its grounds and reasons for not complying with said act of the legislature and its reasons why this court should not take jurisdiction or issue its writ, as follows, to-wit:

That the statute above referred to which the Attorney General seeks to enforce and which purports to forbid the charging of a higher rate for transporting coal than that fixed therein, is void, and for the following reasons:

1. Said act is void for the reason that it violates the commerce clause of the Constitution of the United States, article 1, section 8, which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."

2. Said act is void in this, that the maximum rate fixed therein is unremunerative, unreasonable, inadequate, and confiscatory, and violates the fourteenth amendment of the Federal Constitution and also section 13 of the State Constitution.

In support of the statement of fact contained in the second subdivision of this return, and for the purpose of aiding this court in determining the preliminary question as to whether there is any occasion for this court to take jurisdiction and for issuing its prerogative writ of injunction against the charging of a higher rate than that fixed in said act, this defendant alleges and states that the maximum rates for carrying coal which the defendant is allowed to charge under the act in question are greatly lower than the rates for similar service fixed by the legislature of the State of Minnesota for that state, and fixed by the railroad commissioners of Illinois for that state and by the railroad commissioners of Iowa for the State of Iowa; that the conditions existing in this state make it impossible to transport coal at a less rate than in the states named. For the purposes of comparison the defendant herewith sets forth the rates proposed for this state and the rates fixed in the states of Minnesota, Illinois and Iowa, as follows:

Miles.	North Dakota statutory rate.	Iowa rate.	Illinois rate.	Minnesota rate.
25	40	46	54	54
50	47	66	76	62
75	55	85	85	72
100	62	100	90	82
200	97	130	110	116
300	120	150	126	154

In proof of, and in support of, the statement that the rates in the states named are as above stated, this court is respectfully requested to take judicial notice of the rates fixed for the State of Minnesota, by chapter 232, laws of 1907, of that state; also of the orders of the Iowa and Illinois railroad commissioners fixing the rates for those states, and defendant offers to produce such books and documents fixing such rates if this court shall so direct.

For the foregoing reasons it is respectfully urged that there is no warrant for judicial interference or for the issuance of a writ of injunction out of this court forbidding this defendant from charging a higher rate than that fixed by the act of the legislature in question.

C. W. BUNN,
BALL, WATSON, YOUNG & HARDY,
Attorneys for Defendants.

On the 19th day of November, 1907, the following stipulation was filed for the appointment of a referee to take and report to the court the testimony in the case.

Stipulation for Appointment of Referee.

It is stipulated that the above entitled case be continued over the present term of court, and that E. D. Hoskins be appointed referee to take and report to the court the testimony in the case.

Dated Nov. 16th, 1907.

T. F. McCUE,
C. J. MURPHY,
BALL, WATSON, YOUNG & HARDY,
Attorneys for Defendants.

On the 20th day of November, 1907, said referee qualified and filed the following oath

9 *Oath of Referee.*

In Supreme Court of the State of North Dakota, ss.

File No. 1625.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General,
Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

I, R. D. Hoskins, having been appointed referee by the Supreme Court of the State of North Dakota, to take the testimony in the above entitled action and report the same to the court, do solemnly swear that I will well and truly hear the facts referred to me and true findings render according to the evidence, so help me God.

R. D. HOSKINS.

Subscribed and sworn to before me this 20th day of November, A. D. 1907.

[SEAL.] EDWIN J. TAYLOR,
Notary Public, State of North Dakota.

My Commission Expires May 14, 1912.

On the 15th day of July, 1908, the following testimony was taken, and proper return made thereof to the said Supreme Court:

In Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General,
Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General,
vs.
MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General,
vs.
THE GREAT NORTHERN RAILWAY COMPANY.

10 Now, on this 14th day of July, 1908, the above entitled cases coming on for the purpose of taking testimony on the part of the several defendants pursuant to the several stipulations heretofore entered into by and between the respective counsel for the state and the several defendants, T. F. McCue, Attorney General

for the State of North Dakota, and E. P. Kelly, appearing on behalf of the plaintiff. C. W. Bunn appearing for the Northern Pacific Railway Company. A. H. Bright appearing for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and W. R. Begg appearing for the Great Northern Railway Company.

The referee heretofore appointed by the honorable Supreme Court of the State of North Dakota not being able to be present, it is hereby stipulated by and between the respective counsel for the plaintiff and the several defendants that for the purpose of taking this testimony George B. Hillman shall act as Notary Public in and for the county of Ramsey and state of Minnesota, to swear the several witnesses, and all the evidence taken upon this hearing shall have the same force and effect and used upon the trial of this cause with the same force and effect as though it had been taken before the referee heretofore appointed.

It is agreed that the testimony may be taken in shorthand by George B. Hillman and transcribed and the recalling of the witnesses and the signatures attached to the several depositions so taken is hereby waived. Said evidence as taken shall be read with the same force and effect as though it had been subscribed and sworn to in the form of a deposition. The testimony of each witness is to be considered as taken in each of the above entitled actions and may be read in each so far as applicable thereto.

Hearing held at 2 o'clock p. m., at the office of the Northern Pacific Railway Company in St. Paul.

J. B. Baird, being duly sworn on behalf of defendants, testified as follows:

Examined by Mr. Bunn:

Q. What is your occupation?

A. General freight agent of the Northern Pacific Railway Company.

Q. In that capacity do you have general supervision of the company's rates and transportation?

A. Yes, sir.

Q. Including those relating to coal in the state of North Dakota?

A. Yes, sir.

Q. How long have you been a traffic officer of this railway?

A. For nearly twenty years.

Q. And you have been familiar with its traffic business for that length of time?

A. Yes, sir.

11 Q. Are you familiar with the transportation of coal in North Dakota and the shipments to and from all the points made and the manner in which made?

A. Yes, sir.

Q. State from what points on the Northern Pacific Railway most of the coal lignite is mined and shipped.

A. It is shipped from New Salem, Blue Grass and Lehigh. They are the principal shipping points at the present time.

Q. Is Sims a shipping point?

A. Sims has been a shipping point. There is not so much shipped now as there has been before.

Q. Have you any figures showing the amount of shipments of this coal?

A. I haven't any figures showing the tonnage from each of the producing points.

Q. In a general way have you

A. In a general way. The tonnage is comparatively small.

Q. Can you give us an idea of how much it is?

A. Well, it would be less than 100,000 tons a year.

Q. Less than 100,000 tons a year from all the points on the Northern Pacific?

A. From all the producing points on the Northern Pacific and from producing points on other roads that ship over the Northern Pacific.

Q. What other shipments move over the Northern Pacific beside those mined on your own road?

A. The coal from Wilton on the Soo line north of Bismarck.

Q. And no other?

A. No, I think that is all. I do not think there is any other coal.

Q. Give us an idea of the comparison of volume of this tonnage with the grain tonnage in North Dakota.

Mr. McCUE: That is objected to as immaterial.

A. It is very small as compared with the grain tonnage.

Q. Can you give a rough statement of the usual grain tonnage?

A. From North Dakota?

Q. Yes.

Mr. McCUE: That is objected to as being immaterial for the reason that the receiving points and the point of delivery is not stated, this action being a matter involving solely the question of freight rates upon coal within the state of North Dakota.

A. I should say it would be less than five per cent of grain tonnage.

Q. Have you prepared by subordinates in your department statements showing this tariff in North Dakota which was made by the legislative act named in the bill of complaint compared with the tariff on coal in other states?

A. Yes, sir.

12 Q. Who has made those statements?

A. Mr. Post and Mr. Faithorn.

Q. Under your general direction?

A. Yes, sir, under my supervision.

Q. How does the volume of coal transportation in North Dakota local to that state and coal mined in that state compare with the volume of coal transported in Wyoming, Iowa, Minnesota, Illinois, Missouri, Indiana, Ohio and Pennsylvania?

Mr. McCUE: That is objected to as incompetent and immaterial, the witness not having shown himself qualified to testify.

A. The tonnage in North Dakota would be very small as compared with the tonnage of coal produced in any of the states named.

Q. Do you know whether the coal in most of the states named is largely transported in trains?

Same objection as last above named.

A. It is transported in large quantities, frequently in trainload lots.

Q. Is there any trainload transportation of coal in North Dakota?

A. No, sir. The tonnage is small and it is scattered over a wide extent of territory, to a great many small towns, and it is usually a car or two at a time.

Q. Mr. Baird, I shall not ask you to testify about these statements which have been prepared under your direction, but you have looked them over, I believe?

A. Yes, sir.

Q. And are they correct to the best of your knowledge and belief?

A. They are to the best of my knowledge and belief. I have looked over the tariffs with which these rates were compared.

Q. While you have not done the detail work yourself, have you supervised it and looked it over in a general way?

A. Yes sir.

Q. And the witnesses who made these statements are present and about to be sworn?

A. Yes, sir.

Q. In your experience as a freight agent and traffic manager do you know of any coal rates so low as these legislative rates in North Dakota?

Mr. McCUE: Objected to as immaterial and irrelevant.

A. I do not know of any general basis of rates in any other section that is as low as the rates in North Dakota. There are instances for certain distances where, for some particular reason, the rate would be as low as North Dakota, but the general basis of rates in North Dakota is lower than it is anywhere else.

13 Q. When you speak of the rates in North Dakota, you are speaking of these legislative rates?

A. Of these legislative rates, yes, sir.

Mr. McCUE: We move to exclude the answer of the witness as being incompetent and as a mere opinion and conclusion and not a statement of any fact.

Q. Have you taken occasion to examine the tariffs in the various states that I have named as a basis of your statement?

A. Yes, sir, at the time this bill was before the legislature I took occasion to compare the rates as shown in that bill with the various coal tariffs in other states of the different railroads, and I found that they were very much lower than the rates made elsewhere.

Mr. McCUE: The question is objected to on the ground that it is immaterial, and we move to exclude the answer on the ground that

it is not responsive and a mere conclusion and opinion of the witness.

We move to exclude all the testimony of this witness for the following reasons and upon the following grounds, that the same is immaterial and irrevelant and that he has not shown that the schedule of rates referred to in other states than the state of North Dakota are reasonable or unreasonable rates or that the conditions prevailing in those different states mentioned by said witness are the same as those in existence in the state of North Dakota.

No cross-examination.

L. FAITHORN, being duly sworn on behalf of defendants, testified:

Examined by Mr. BUNN:

Q. Mr. Faithorn, what is your occupation?

A. I am clerk in the general freight office.

Q. And what are your duties as such?

A. In compiling tariffs, freight tariffs.

Q. When you say general freight office, you mean that of the Northern Pacific Railway?

A. Of the Northern Pacific, yes, sir.

Q. And you are in Mr. Baird's department, one of his subordinates?

A. Yes, sir.

Q. How long have you been in that or similar occupation?

A. Twenty-five years.

Q. Where is the statement that you prepared, Mr. Faithorn?

Statement produced and marked Def'ts. Ex. 1.

Q. The statement referred to by witness is headed "Comparison of New Soft Coal Rates in North Dakota with the Present Rates, also with Iowa and Illinois Commissioners' Rates." Was this prepared by you?

14

A. Yes, sir, these figures were prepared by me. This statement itself was not prepared by me.

Q. You mean the statement was typewritten by somebody else but the figures were prepared by you?

A. The statement was typewritten by somebody else but the figures were prepared by me, yes, sir.

Q. From what did you take the figures?

A. From the existing schedules of rates that were in force, these tariffs.

Q. Taking the first column, Mr. Faithorn, headed "North Dakota" under the heading "Present Rate," you refer to the present rate of the Northern Pacific Railway Company?

A. Yes, sir

Q. Between points named?

A. Yes, sir.

Q. Under the heading "Proposed Rate" I take it you refer to the rates named in the law of North Dakota referred to in the bill of complaint?

A. Yes, sir.

Q. Under the headings "Iowa Rate for Same Distance" and "Illinois Rate for Same Distance," from where did you take those figures?

A. The Iowa rates were taken from the Iowa state Commissioners' schedule. The Illinois rates were taken from the Atchison, Topeka & Santa Fe tariff, which is a copy of the Commissioners' schedule as to coal rates.

Q. You have taken in this statement rates from New Salem on the Northern Pacific, rates from Blue Grass, rates from Sims and rates from Lehigh. Those are the same points that Mr. Baird referred to as being points where coal is produced on the Northern Pacific in North Dakota?

A. Yes, sir.

Q. And the rates you give in this statement are from those points to all other stations in North Dakota on the Northern Pacific?

A. All stations for which rates are quoted in our tariffs.

Q. Are these statements correct to the best of your belief?

A. Yes, sir.

Def't's Ex. 1 offered in evidence.

Mr. McCUE: The offer is objected to on the ground that the same is incompetent and immaterial, the witness not having shown that the same were compiled from official reports or official schedules which are in force and effect in the states of Iowa and Illinois; that the comparison of the rates under the law of the state of North Dakota with the alleged and pretended rates in the states of Iowa and Illinois is a mere conclusion of the witness, he having not shown himself qualified to testify thereto, no objection being made on the ground that the offer is a copy.

15 Q. They have railroad commissions in the states of Illinois and Iowa and I believe in Missouri also?

A. Yes, sir.

Q. And these tariffs which you have referred to from the states of Illinois and Iowa are the railroad commissioners' tariffs?

Objected to as leading and incompetent and immaterial, the witness not having shown himself qualified to testify.

A. Yes, the commissioners published this.

Mr. BUNN: In this connection, Mr. Reporter, I should like to have this paper marked Deft's. Ex. 2. It is a mere compilation made for convenience, showing the rates specified in the North Dakota statute, and if it is incorrect in any way, it is understood that it may be corrected by reference to the law itself.

Cross-examination by Mr. McCUE:

Q. What has been your particular line of work in office?

A. Oh, general clerical work in the general freight office. I have also occupied the position as assistant general freight agent of the Chicago & Alton railroad for many years.

Q. You have been acting as a clerk?

A. I am at present, yes.

Q. And that has been your work since you have been with the Northern Pacific?

A. Yes, sir.

Q. And that has covered a period of how many years?

A. Eighteen months.

Q. All you know about these schedules of rates is what you find in the books and that which you have examined?

A. Yes, sir; other than the fact that the Illinois and Iowa rates are established by the Commission.

Mr. McCUE: I move to exclude the answer of the witness as not responsive.

Upon request the question was repeated to the witness.

A. Yes.

Q. The books which I referred to are the books which are used by the Northern Pacific Railway Company, are they?

A. Yes.

Q. Are you acquainted with the Railroad Commissioners of the states of Iowa and Illinois?

A. Not personally, no.

Q. You don't know whether the copies which you have submitted here in your examination are copies of official reports as made by the Railroad Commissioners of the states of Iowa and Illinois, do you?

A. The Iowa tariff is published by the Commissioners.

Mr. McCUE: I move to exclude the answer of the -ness on the ground that the same is not responsive.

16 WITNESS: The Illinois schedule used by me is a copy of this tariff published by the Illinois Commission.

Mr. BUNN: Tell Mr. McCue what it is.

Q. You don't know that the alleged reports from which you took this copy were actually published and issued by the Railroad Commissions of the two states named, do you?

A. Yes.

Q. Of your own knowledge?

A. Yes.

Q. How do you know it?

A. Because it states so right on the publication.

Q. Then, as I understand you, all you know about it is what you have read from reading the paper books which were furnished you as alleged reports of the Commissioners of the two states named?

A. The schedules themselves are the Commissioners' publication.

Upon request the question was repeated to the witness.

WITNESS: Yes.

Q. And you don't know whether these alleged reports which have been furnished you from which you drafted Deft's. Ex. 1, were the correct and official reports issued and made by the Railroad Commissioners of the states of Iowa and Illinois and which schedules

are now in force and effect in those two states, of your own knowledge?

A. Yes, they are schedules of the Commissions.

Q. How do you know they are?

A. Because they say so on their face.

Q. You learned that from the mere printing upon the face of these reports from which you took the copy offered?

A. My experience also——

Q. No, no.

Mr. BUNN: Let him answer. Go on and make your answer.

Mr. MCCUE: I object to——

Mr. BUNN: He is going to answer just the same. I object to having you interrupt him. Go on and answer.

WITNESS: My experience in the past with the Illinois Railroad Commission and Iowa Commission leads me to believe that those tariffs are their publication.

Mr. MCCUE: We move to exclude the answer of the witness as not responsive and as a mere opinion and conclusion and based upon no fact. And we ask to have the original question read.

Question read to witness.

WITNESS: Shall I answer the question?

Mr. BUNN: I don't know whether you want to answer it again or not. If the Attorney General wants you to answer again, tell him what you want.

17 WITNESS: I really don't know how to answer it any differently than that.

Q. Then if I gather my conclusions correctly, you don't know whether or not the paper books and reports from which you took this copy were correct?

A. Only as they are published, that is all.

Q. Who published them?

A. The Commissioners of the states which they represent.

Q. How do you know they did?

A. It states right on the publication.

Q. That is why you base your conclusion that the Commissioners issued this paper book?

A. Yes.

Q. What experience have you had with the Railroad Commissioners of the states of Iowa and Illinois?

A. The publication of rates promulgated by them from time to time.

Q. How is that?

A. The promulgation of the issuance of rates published by them from time to time.

Q. Were you ever connected officially with the Railroad Commissioners of the states of Iowa and Illinois?

A. No, sir, but my reference to the publication had reference to the issuance of the tariffs for the roads that were governed by those schedules.

Q. Then all you know about it is what you saw in statements which reached your notice?

A. Yes, sir.

Redirect examination by Mr. BUNN:

Q. Mr. Faithorn, do you know that these books are the books which are generally recognized among railways in the country over as official publications of the Commissions in Iowa and Illinois?

A. Yes, sir.

Mr. MCCUE: That is objected to as calling for a conclusion and opinion of the witness, and the witness has not shown himself qualified to testify.

Q. Do the railway companies use these books as the official books?

Mr. MCCUE: Same objection.

A. Yes, sir.

Q. And their tariffs are made in accordance with them?

Mr. MCCUE: Objected to upon the same grounds and upon the same reasons, and also on the ground that it is misleading.

A. Yes, sir.

Q. The book which you refer to, on its cover reads as follows, does it not: "State of Iowa, Schedule of Reasonable Maximum Rates and Charges for the Transportation of Freight and Cars on each of the Railroads of the State of Iowa, together with the classification of freights prepared by the Railroad Commissioners in ac-
18 -cordance with the laws of the state, taking effect March 1, 1905"?

A. Yes, sir.

Mr. MCCUE: Objected to for all reasons stated, all the grounds heretofore made and further for the reason that the record read from by Mr. Bunn has not been shown to be official or issued by the authority of the state of Iowa.

Q. The Illinois tariff from which you took your figures was the tariff of the Atchison, Topeka & Santa Fe Railway Company in the state of Illinois entitled "Illinois Distance Tariff No. 8069, issued June 30, 1906, effective July 1, 1906." Is that correct?

A. Yes, sir, that is the tariff.

Objected to by Mr. McCue as a conclusion and opinion of the witness, and the witness not having shown himself qualified to testify.

W. S. POST, being duly sworn on behalf of defendants, testified.

By Mr. BUNN:

Q. What is your occupation?

A. Tariff clerk in the general freight department under Mr. J. B. Baird.

Q. How long have you been engaged in that and similar occupation?

A. Why, I have been ten years with the Northern Pacific, most of which time in connection with rates and tariff work.

Q. Checking and examining tariffs and making schedules of rates, making up new tariffs, etc.?

A. Yes, sir.

Q. For Mr. Baird and——

A. Under his supervision, yes, sir.

Q. Will you show me — statement that you have prepared?

A. This is the statement that I did not prepare but I checked over the figures and found them to be correct with the exceptions as noted.

Q. This statement which you have checked over you found to be correct, the exceptions noted by you in lead-pencil?

A. Yes, sir.

Q. Under the heading "North Dakota Proposed Rates"?

A. Yes, sir.

Q. And as it stands now with the lead-pencil marks upon it, it is correct?

A. Yes, sir.

Statement above referred to marked Defts. Ex. 3.

Q. This statement contains five columns and refers to "North Dakota Present Rate"—as I understand, that means the present rate of the Northern Pacific Railway Com-any?

A. Yes, sir.

Q. And "North Dakota proposed rate" refers to the rates specified in this act of the legislature in litigation?

A. Yes, sir.

19 Q. "Iowa Commission's Rate" refers to the rates made for railways in the state of Iowa by the Railway Commission of that state?

A. It does.

Q. The same schedule referred to by the last witness.

A. Yes.

Q. "Illinois Commission's Rate" the same for the state of Illinois?

A. Yes, sir.

Q "Minnesota Legislative Rate in Litigation", what is meant by that?

A. That is meant the rates which were set forth by the legislature of the state of Minnesota. We got them from the House Bill—1060 I think is the number.

Q. Those are the rates which were made by the last session of the legislature?

A. Yes, sir, and which are now in litigation.

Q. They are involved in the suit of Shepard again-t the Northern Pacific Railway Company?

A. Yes, sir.

Q. In the United States Circuit Court?

A. Yes, sir.

Q. And are they lower than the existing railway rates in Minnesota?

A. They are.

Q. Do you know about what per cent, roughly?

Mr. McCUE: That is objected to on the ground that the witness has not shown himself qualified to testify, and as incompetent and calling for a mere conclusion and opinion of the witness.

A. I should say that they are fifteen to twenty per cent lower.

Q. Than the existing railway rates in Minnesota?

A. Yes, sir.

Q. Are the figures shown in this statement—I think you said they were correct?

A. Yes, sir.

Q. This statement refers exclusively to coal rates, does it not?

A. It does.

Defts. Ex. 3 offered in evidence.

Mr. McCUE: Objected to on the ground it is incompetent and immaterial, and the proper foundation has not been laid for introduction; No objection being made, however, on the ground that it is a copy.

Q. Now, did you prepare a further statement entitled "Comparison of Coal Rates"?

A. I did.

Q. Referring to the last mentioned statement marked Defts. Ex. 4, in the left-hand column the words "North Dakota—Present" mean the existing North Dakota rates as stated?

A. Yes, sir.

Q. "North Dakota—Proposed" means the rates specified in the act of the legislature referred to?

A. Yes, sir, it does.

20 Q. The "Distance Tariff Rates, Iowa, Illinois, Missouri and Kansas" refer to what?

A. Refer to the published tariffs of the various lines within those states filed with the Interstate Commerce Commission.

Q. What tariffs have you examined and taken these figures from under those headings?

A. I have examined the Iowa classification which has already been submitted in evidence; also tariffs of the Chicago, Great Western Railway in the State of Iowa, and the Atchison, Topeka & Santa Fe Railway tariff already submitted in evidence. In Illinois the Illinois classification which contains the commissioners' rates for that state. In Missouri the distance tariff of the Missouri Pacific Railway, and in Kansas the distance tariff of the Missouri Pacific Railway.

Q. The next headings refer to Kansas City, Missouri, Rock Springs, Wyoming, and Pittsburg, Kansas. What are those?

A. They represent the terminal rates from the points named.

Q. That is, if I understand, they are the rates charged for the shipment of coal out of Kansas City for the distances named, the

rates charged out of Rock Springs, Wyoming, and out of Pittsburg, Kansas, for the distances named?

Mr. McCUE: That is objected to as immaterial and irrelevant.

Q. Why do you take Rock Springs, Wyoming, and Pittsburg, Kansas?

A. We selected a large coal shipping point from Wyoming and one in Kansas in addition to Kansas City.

Q. Are those the principal mines in the territory?

A. Rock Springs is the principal mine; Pittsburg, Kansas, is a large producing point. Shipments move through Kansas City from other mines, which rate is based on that point.

Q. The next are "Rates From Terminal and Producing Points. Rates From Points in Nebraska Set by the I. C. C.," meaning, if I understand it, the Interstate Commerce Commission?

A. Yes, sir.

Q. What are those rates?

A. Those rates represent the figures which were declared to be the proper rates to be applied on traffic from the stations named in Nebraska for the distances shown by the Interstate Commerce Commission.

Q. This is from Rock Springs, Wyoming, and from Hanna, Wyoming?

A. Yes, sir.

Q. Large coal mines there?

A. Yes, sir.

Q. What opinion of the Interstate Commerce Commission did you take that from?

A. It was a report; I could not say just now which one.

Q. You have it, haven't you?

A. We have that decision, yes, sir.

21 Q. I wish you would send down for it. Give us the name of the case so that there will not be any uncertainty about it. Now, the next words are "Eastern Rates, Indiana, Ohio and Pennsylvania." Where did you get them?

A. I got them from the publi-hed tariffs of the various lines in the states named.

Q. Well, tell us a little more fully about that?

A. From Indiana I have taken the rates from Brazil, a coal shipping point on the Chicago & Eastern Illinois Railroad.

Q. Is that considerable of a mining point?

A. Yes, sir.

Q. Chicago & Eastern Illinois toward Chicago?

A. Yes, sir, and through Michigan towards Detroit. From Ohio I have taken the rates from Bellaire, Ohio, to points on the Baltimore & Ohio Railroad westward toward Chicago.

Q. Is that Bellaire a large producing point?

A. Yes, sir. And from Pennsylvania I have taken the rates from Lily, Pennsylvania, at a point on the Pennsylvania Railroad, westward on the Pennsylvania Company's line. Lily is about 75 miles east of Pittsburg.

Q. Is it in the Pittsburg bituminous coal mining region?

A. Yes, sir.

Q. And a large producing point?

A. Yes, sir.

Q. Finally, rates "To Philadelphia, Pa., From Huntington, Altoona, Johnstown, Hillsdale and Pittsburg." Where did you get them?

A. I got them from the published tariffs of the Pennsylvania Railroad Company, which represent the rates to the seaboard or Philadelphia, as shown. The stations are shown and the distances also from Philadelphia.

Q. All these rates which you have in this statement are rates on soft coal?

A. They are.

Q. You haven't included any anthracite coal rates?

A. No, sir.

Q. As a rule, are anthracite rates higher or lower?

A. As a rule they are higher.

Q. They are never lower, are they?

A. They are never lower, no, sir.

Q. Sometimes the same and some times higher?

A. Yes, sir.

Q. In making this statement did you take the latest tariffs of these various railways?

A. Yes, sir.

Q. So that they are, as you understand it, the existing rates charged in the territory described in the statement?

A. Yes, sir.

Mr. Bunn: I offer Ex. 4 in evidence.

Mr. McCue: Objected to on the ground that the same is incompetent and immaterial, no proper foundation has been laid
22 for its introduction, the witness has not shown himself qualified to testify from the several items and figures contained therein, and that the conditions that exist in the several states named, other than the State of North Dakota, have not been shown to be the same as were in existence in the State of North Dakota.

Q. In all this territory described and referred to in Ex. 4, how does the production and shipment of coal compare in volume with North Dakota?

A. The production and shipment of coal from the points named is vastly greater than that from the North Dakota mines.

Q. Did you know whether a large proportion of coal in the states you have referred to moves in trainloads?

A. Yes, sir.

Q. You mean that it does?

A. It does.

Q. Does it ever in North Dakota?

A. No, sir.

Q. What is the character of that production and shipment?

A. It is produced from the mine in very small quantities and shipped not to exceed one or possibly two carloads at a time.

Q. And is it shipped to any one point, or is it scattered to various stations all through the state?

A. It is scattered to various stations throughout the state.

Cross-examination.

By Mr. McCue:

Q. Are you willing to testify that coal is only shipped from New Salem east to other points in the State of North Dakota in carload lots, and that their shipments are not sufficient to make up a trainload?

A. Yes, sir.

Q. What do you consider a trainload consists of?

A. That depends very largely——

Q. In the State of North Dakota?

A. In the State of North Dakota of forty cars.

Q. What kind of cars, what capacity?

A. About 60,000 pounds.

Q. Forty cars of 60,000 pounds *consist* a trainload?

A. Yes, sir.

Q. You have never known of more than one to two cars being shipped over the Northern Pacific east from New Salem at any one time?

A. No, sir.

Q. And your testimony given here is based upon that information?

A. Yes, sir.

Q. Do you know what rates those alleged rates were which you examined from the several states to which you have testified?

A. Yes, sir.

Q. Will you give us the date of the schedule from which you took those copies?

A. I believe Iowa is the first.

23 Q. Yes?

A. March 1, 1905; Illinois, July 1, 1906; Missouri, March 1, 1904; Kansas, April 27, 1905; from Kansas City, April 1, 1907; from Rock Springs, May 1, 1905; from Pittsburg, Kansas, October 12, 1905; Indiana, July 10, 1907, and August 1, 1907; the first referring to state rates locally in Indiana and the second to Interstate rates. Ohio, June 25, 1906; Pennsylvania, October 21, 1905. I cannot give the date of effect of the rates to Philadelphia from the four points shown.

Q. When did you obtain these reports from which you have compiled Ex. 1?

A. The published tariffs of the various lines which I have mentioned which are filed with the Interstate Commerce Commission.

Q. From whom did you obtain them?

A. They were obtained from copies already on file in this office. One or two copies, we had to write to the various lines for a copy.

Q. Did you file them?

A. Do you mean in the books?

Q. Did you file them, produce them for use, in the Northern Pacific Railway offices?

A. I obtained them from our copies, from our rate clerks, filed for use in this particular case.

Q. Did you obtain them from the Interstate Commerce Commission yourself?

A. No, sir.

Q. You don't know who brought them to your office for your inspection?

A. They came by United States mail or railroad mail.

Q. You don't know whether there are newer and later schedules of rates in the several states mentioned than those from which you have compiled Ex. 4?

A. No, sir.

Q. You don't know of your own knowledge whether the rates given in the reports from which you compiled Ex. 4 were reasonable or unreasonable?

A. No, sir.

Q. You have no knowledge of that fact whatever?

A. No, sir.

Redirect examination.

By Mr. Bunn.

Q. What efforts did you make to get the latest tariffs in each one of these other states?

Mr. McCue: Objected to as immaterial.

A. We examined the last supplement, and in the majority of cases that last supplement was of a date sufficiently late to indicate to us that it was the latest supplement that had been issued, indicating that this tariff was still in force and effect.

Mr. McCue: We move to exclude the latter part of the answer of the witness as being immaterial; it is simply his state-
24 ment based upon a conclusion and opinion and not the statement of any fact.

Q. To the best of your belief, then, these tariffs which you have given are tariffs at present in force in the other territory referred to?

Mr. McCue: Same objection as last above.

A. Yes, sir.

Q. And you have taken the usual means used by the tariff officials to find out that fact, have you?

A. Yes, sir.

Mr. McCue: Objected to as calling for a conclusion and opinion of the witness, incompetent and leading, and the witness has not shown himself qualified to testify.

Q. The tariffs in Pennsylvania referred to, I don't think you told us where you got them, the rates in Pennsylvania?

A. I got them from the issue of the Pennsylvania Railroad Company which I have in my hand.

Q. The tariff of the Pennsylvania Railroad Company?

A. Yes, sir.

Q. That applies to the rates in this statement opposite the word "Pennsylvania" and the rates to Philadelphia?

A. No, sir, only insofar as the rates opposite Pennsylvania are concerned.

Q. Now, with respect of the rates to Philadelphia, where did you get them?

A. I got them from a tariff of the Pennsylvania Railroad Company which we obtained from Chicago, and were compelled to return them, as the supply was limited.

Q. You haven't got them here with you?

A. And we couldn't obtain it last night

Q. Is it customary among railroads to furnish each other these tariffs as issued?

Mr. McCUE: Objected to as incompetent, the witness has not shown himself qualified to testify.

A. It is.

Q. And you get these tariffs in the usual course of mail in accordance with that custom?

A. Yes, sir.

Q. Tell us where you got the rate from Rock Springs, Wyoming, and from Hanna, Wyoming, 250, 300 and 400 miles in your statement?

A. I obtained the report of the commission.

Q. What commission?

A. The Interstate Commerce Commission, in the case of Nebraska State Railway Commission vs. The Union Pacific Railroad Company, decided April 6, 1908.

Q. Have you also made a statement which we will have marked Ex. 5?

A. Yes, sir.

Q. Mr. Post, have you all the tariffs that you have referred
25 to in making these statements now in this room or accessible?

A. With the exception, as previously noted, namely, the tariff to Philadelphia from Pennsylvania points.

Q. With the exception of that one?

A. Yes, sir.

Mr. BUNN: Please state, Mr. Reporter, that the Attorney General is invited to examine these tariffs and given the fullest permission and freedom to do so and our assistance for that purpose.

Q. Have you made a statement, now marked Def't's Ex. 5, comparing the grain rate to Minneapolis on the main line of the Northern Pacific Railway Company running west from Minneapolis with the proposed legislative North Dakota coal rate at distances commencing twenty-five miles up to 300 miles and at intervals of twenty-five, and give the comparison in tons of grain and tons of coal?

A. Yes, sir

Q. That is contained in this Ex. 5?
A. Yes, sir.
Q. Where did you take those figures from?

Mr. McCUE: That is objected to as immaterial, and for the reason that the rate as shown by the schedule and separated into 2000 pounds is not a proper comparison, and also it involves matters of interstate commerce which are not involved in this litigation.

A. The North Dakota legislative coal figures shown were obtained from the published tariff of the Northern Pacific Railway.
Q. Now in effect?
A. Now in effect.
Q. In so doing did you follow the main line of the Northern Pacific from Minneapolis to Fargo?
A. I did.
Q. And Fargo is about what distance from Minneapolis?
A. 238 miles.
Q. So that the table, up to 225 miles, would be rates local in Minnesota, and 250 miles or above would be interstate?
A. Yes, sir.
Q. These grain rates in Minnesota are in litigation in this same Shepard suit, aren't they, as to their reasonableness?
A. Not these grain rates named in this statement.
Q. Not the grain rates named in this statement?
A. No, sir.
Q. These are the rates which the railroads are charging and which they are resisting lowering in the Shepard suit?
A. Yes, sir.

Mr. BUNN: Def't's Ex. 5 is offered in evidence.
Mr. McHUGH: Objected to as immaterial.

Recross-examination.

By Mr. McCUE:

Q. You have testified that you caused schedule designated as Ex. 4 to be prepared?
A. Yes, sir.
26 Q. A great portion of that schedule was prepared from estimates made upon rates involving shipments of coal from one point in a certain state to a point in another state?
A. No, sir. Indiana and Ohio were interstate rates, running from state to interstate, and the Lily rates from Lily through Pennsylvania and into Ohio, and rates from Indiana and Brazil running north to Chicago through Illinois and then east through Michigan.
Q. The rates from Brazil, Indiana, running through to Chicago, would go into part of Illinois?
A. Yes, sir. About 150 miles of that would be state traffic through Indiana.
Q. You don't know anything about the grades in Indiana, Ohio,

and Illinois as compared with the grades in the State of North Dakota on the railways?

A. I do not.

Q. You don't know anything at all about the difference in the cost of transportation in the states of Indiana, Ohio and Pennsylvania and that of the State of North Dakota?

A. Not definitely, no, sir.

Q. That is also true of the states of Iowa, Illinois, Missouri and Kansas?

A. Yes, sir.

The taking of this testimony is hereby adjourned to be resumed upon the giving of five days' notice to the plaintiff.

I hereby certify that at the time and place above named, I, in accordance with the agreement and stipulations of the attorneys in the above entitled cases, took the foregoing testimony in shorthand and transcribed the same into longhand, and that the same is a true and correct transcript of the evidence as given by the several witnesses.

Dated July 14, 1908.

[SEAL.] GEO. B. HILLMAN,
Notary Public, Ramsey County, Minnesota.

My Commission Expires June 8, 1911.

(No page 27.)

DEFENDANT'S

Comparison of New Soft Coal Rates in North Dakota With

	North Dakota					North Dakota		
	Distance	Present rate from New Salem	Proposed rate	Iowa rate for same distance	Illinois rate for same distance	Distance	Present rate from Blue Grass	Proposed rate
Reeves Spur, N. D.	142	107	74	113½	99	146	111	72
Ypsilanti, N. D.	148	113	76	115	100	152	113	78
Montpelier, N. D.	154	116	78	116½	101	158	116	80
Adrian, N. D.	162	117	82	119½	103	165	117	82
Dickey, N. D.	168	122	84	121	104	172	122	86
Grand Rapids, N. D.	177	126	87	124	106	180	127	87
La Moure, N. D.	185	126	89	125½	107	188	129	91
Berlin, N. D.	195	134	93	128½	109	198	138	95
Medberry, N. D.	201	138	97	132	111	204	138	97
Edgeley, N. D.	206	138	97	132	111	210	142	97
Deisem, N. D.	211	142	99	134	112	214	142	99
Jud, N. D.	219	146	99	134	112	221	146	101
Alfred, N. D.	226	146	101	136	113	229	150	101
Gackle, N. D.	233	150	104	138	115	236	150	104
Streeter, N. D.	244	154	105	140	117	147	158	106
Oakes Jct., N. D.	190	129	91	127	108	194	129	95
Glover, N. D.	198	133	95	130	110	201	133	97
Oakes, N. D.	205	135	97	132	111	209	138	97
Janet, N. D.	209	139	97	132	111	213	140	99
Crete, N. D.	213	139	99	134	112	217	142	99
Sturm, N. D.	221	142	101	136	113	224	142	101
Gwinner, N. D.	228	147	101	136	113	231	147	104
Hove, N. D.	233	152	104	138	115	236	152	104
Milnor, N. D.	238	152	101	138	115	242	152	106
De Lamere, N. D.	245	152	106	140	117	248	156	106
Star Lake, N. D.	248	157	107	140	117	251	156	109
Wyndmere, N. D.	254	157	109	142	119	258	163	109
Barney, N. D.	260	164	109	142	119	264	164	111
Mooreton, N. D.	266	167	111	144	121	270	167	111
Fairview, Jct., N. D.	269	167	111	144	121	272	167	111
Adams, N. D.	272	167	114	146	122	275	167	114
Woodruff, N. D.	274	167	114	146	122	277	169	114
Van Pelis, N. D.	275	167	114	146	122	279	169	114
Keystone Jct., N. D.	276	169	114	146	122	280	169	114
Great Bend, N. D.	277	169	114	146	122	281	169	117
Warner, N. D.	280	169	114	146	122	284	169	117
Bayne, N. D.	282	169	117	148	124	286	169	117
Farmington, N. D.	272	167	111	146	122	276	167	114
Stevensons, N. D.	275	167	114	146	122	278	169	114
Wapeton, N. D.	279	169	114	146	122	283	169	117
Breckenridge, Minn.	280	169	114	146	122	282	169	117
Verona, N. D.	196	129	95	130	110	200	132	97
Englevale, N. D.	201	133	97	132	111	208	136	97
Elliott, N. D.	209	136	97	132	111	212	136	99
Lisbon, N. D.	216	136	99	134	112	220	140	99
Buttzville, N. D.	222	141	101	136	113	226	141	101
Sheldon, N. D.	231	147	104	138	115	235	147	104
Coburn, N. D.	237	152	104	138	115	241	152	106

EXHIBIT 1. 29

the Present Rates, Also With Iowa and Illinois Com'rs Rates.

Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance
		Distance	Present rate from Sims	Proposed rate			Distance	Present rate from Lehigh	Proposed rate		
112	98	149	111	76	115	100	219	128	99	134	112
116½	101	156	113	80	118	102	225	132	101	136	113
118	102½	162	116	82	119½	103	231	135	104	138	115
120½	103	169	121	84	121	104	239	140	104	138	115
122½	105	175	122	86	122½	105	245	144	106	140	117
124	106	184	127	89	125½	107	254	149	109	142	119
127	108	192	129	93	128½	109	262	152	111	144	121
130	110	202	138	97	132	111	272	167	114	146	122
132	111	208	142	97	132	111	278	169	114	146	122
132	111	214	142	99	134	112	283	169	117	148	124
134	112	218	146	99	134	112	288	171	117	148	124
136	113	226	146	101	136	113	296	171	119	150	126
136	113	233	150	104	138	115	303	174	120	152	129
138	115	240	154	104	138	115	310	175	120	152	129
140	117	251	158	109	142	119	321	178	126	156	131
130	110	197	132	95	139	110	167	153	111	144	121
132	111	205	133	97	132	111	275	156	114	146	122
132	111	212	138	99	134	112	282	160	117	148	124
134	112	216	140	99	134	112	286	163	117	148	124
134	112	220	143	99	134	112	290	164	117	148	124
136	113	228	146	101	136	113	298	156	119	150	126
138	115	235	147	104	138	115	305	167	120	152	129
138	115	240	152	104	138	115	310	169	120	152	129
140	117	245	152	106	140	117	315	169	124	154	129
140	117	251	156	109	142	119	321	172	126	156	131
142	119	255	163	109	142	119	325	177	126	156	131
142	119	261	163	111	144	121	331	177	129	158	131
144	121	267	167	111	144	121	337	182	129	158	131
144	121	273	167	114	146	122	343	183	131	160	134
146	122	276	167	114	146	122	346	183	131	160	134
146	122	279	169	114	146	122	349	185	131	160	134
146	122	281	169	117	148	124	351	185	134	162	134
146	122	283	169	117	148	124	352	185	134	162	134
146	122	284	169	117	148	124	353	185	134	162	134
148	124	284	169	117	148	124	354	185	134	162	134
148	124	288	171	117	148	124	357	187	134	162	134
148	124	289	171	117	148	124	359	187	134	161	134
146	122	279	169	114	146	122	349	185	131	160	134
146	122	282	169	117	148	124	352	185	134	162	134
148	124	286	171	117	148	124	356	187	134	162	134
148	124	287	171	117	148	124	357	187	134	162	134
132	111	203	132	97	132	111	273	153	114	146	122
132	111	211	136	99	134	112	281	155	117	148	124
134	112	216	140	99	134	112	286	155	177	148	124
134	112	224	140	101	136	113	294	157	119	150	126
136	113	229	145	101	136	113	299	161	119	150	126
138	115	238	150	104	138	115	308	166	120	152	129
140	117	245	156	106	140	117	315	170	124	154	129

	North Dakota					North Dakota		
	Distance	Present rate from New Salem	Proposed rate	Iowa rate for same distance	Illinois rate for same distance	Distance	Present rate from Blue Grass	Proposed rate
Eland, N. D.	86	.....	58	94	88	90	.....	58
South Heart, N. D.	93	.....	59	97	89	97	.....	61
Belfield, N. D.	102	.....	62	101½	91	106	.....	64
Fryburg, N. D.	107	.....	64	103	92	111	.....	65
Sully Springs, N. D.	113	.....	65	104½	93	117	.....	67
Scoria, N. D.	116	.....	67	106	94	120	.....	67
Medora, N. D.	121	.....	68	107½	95	125	.....	68
Little Missouri, N. D.	122	.....	68	107½	95	126	.....	69
Waldron, N. D.	127	.....	69	109	96	130	.....	69
Demores, N. D.	133	.....	71	110½	97	136	.....	72
Sentinel Butte, N. D.	138	.....	72	112	98	141	.....	74
Chama, N. D.	142	.....	74	113½	99	145	.....	76
Beach, N. D.	146	.....	76	115	100	150	.....	76
Dickinson, N. D.	82	90	56	91	87	78	90	55
Gladstone, N. D.	70	86	52	82	84	67	86	52
Knowlton, N. D.	67	86	52	82	84	64	81	50
Taylor, N. D.	63	81	50	78	82	59	81	49
Richardton, N. D.	57	81	49	74	80	53	75	47
Antelope, N. D.	51	75	47	70	78	48	75	46
Knife River, N. D.	46	68	46	66	76	42	68	44
Hebron, N. D.	42	68	44	62	72	39	68	43
Eagles Nest, N. D.	35	59	41	54	63	31	59	41
Glen Ullen, N. D.	29	59	40	50	58	25	59	38
Kurtz, N. D.	25	50	38	46	54	21	59	38
Curlew, N. D.	18	50	37	42	50	14	40	35
Almont, N. D.	12	40	35	38	45	8	40	30
Felands Spur, N. D.	8	40	30	34	40	5	30	30
Sims, N. D.	7	40	30	34	40	4	30	30
Blue Grass, N.D.	4	30	30	30	32	.....	.....	.....
New Salem, N. D.	.....	.....	.....	.....	.....	4	.....	30
Sedalia, N. D.	3	30	30	30	32	7	40	30
Judson, N. D.	6	40	30	34	40	10	40	30
Sweet Briar, N. D.	12	40	35	38	45	16	50	37
Marmot, N. D.	19	50	37	42	50	23	50	38
Sunnyside, N. D.	25	50	38	46	54	28	50	40
Mandan, N. D.	28	50	40	50	58	32	50	41
Bismarck, N. D.	34	50	41	54	63	37	50	43
Apple Creek, N. D.	41	68	44	62	72	45	68	44
Burleigh, N. D.	47	75	46	66	76	50	75	46
McKenzie, N. D.	52	75	47	70	78	56	75	49
Besesoba, N. D.	65	81	50	78	82	68	86	52
Hazelton, N. D.	79	90	55	88	86	83	90	56
Brofy, N. D.	89	94	58	94	88	93	94	59
Linton, N. D.	97	98	61	100	90	101	98	62
Sterling, N. D.	59	81	49	74	80	62	81	50
Angora, N. D.	61	81	50	78	82	65	86	50
Driscoll, N. D.	66	81	52	82	84	70	86	52
Geneva, N. D.	69	86	52	82	84	73	86	53
Rankin, N. D.	74	86	53	85	85	78	90	55

1.—Continued.

Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance
		Distance	Present rate from Sims	Proposed rate			Distance	Present rate from Lehigh	Proposed rate		
94	88	93	....	59	97	89	9	40	30	34	40
100	90	100	....	61	100	90	16	50	37	42	50
103	92	109	....	64	103	92	25	50	38	46	54
104½	93	115	....	65	104½	93	30	50	40	50	58
106	94	120	....	67	106	94	36	68	43	58	68
106	94	124	....	68	107½	95	40	68	43	58	68
107½	95	126	....	69	109	96	44	68	44	62	72
109	96	129	....	69	109	96	45	68	44	62	72
109	96	134	....	71	110½	97	50	75	45	66	76
112	98	140	....	72	112	98	56	75	49	74	80
113½	99	145	....	74	113½	99	61	81	50	78	82
113½	99	149	....	76	115	100	65	86	50	78	82
115	100	154	....	78	116½	101	69	86	52	82	84
88	86	75	86	53	85	85	5	30	30	30	32
82	84	63	81	50	78	82	7	40	30	34	40
78	82	60	81	49	74	80	10	40	30	34	40
74	80	55	75	47	70	78	14	50	35	38	45
70	78	50	75	46	66	76	20	50	37	42	50
66	76	44	68	44	62	72	26	50	40	50	58
62	72	38	68	43	58	68	31	59	41	54	63
58	68	35	59	41	54	63	35	59	41	54	63
54	63	28	59	40	50	58	42	68	44	62	72
46	54	21	50	38	46	54	48	75	46	66	76
46	54	17	50	37	42	50	52	75	47	70	78
38	45	11	40	35	38	45	59	75	49	74	80
34	40	5	36	30	30	32	65	75	50	78	82
30	32	1	30	30	30	32	69	75	52	82	84
30	32	....	....	....	....	....	70	75	52	82	84
....	....	4	30	30	30	32	73	75	53	85	85
30	32	7	40	30	34	40	77	75	55	88	86
34	40	11	40	35	38	45	81	75	56	91	87
34	40	14	40	35	38	45	83	75	56	91	87
42	50	19	50	37	42	50	89	75	58	95	88
46	54	27	50	40	50	58	97	75	61	100	90
50	58	32	50	41	54	63	101	75	62	101½	91
54	63	35	50	41	54	63	105	75	62	101½	91
58	68	41	50	44	62	72	111	80	65	104½	93
63	72	49	75	46	66	76	118	106	67	106	94
66	76	54	75	49	70	78	124	106	68	107½	95
74	80	59	81	49	74	80	129	110	69	109	96
82	84	72	86	53	85	85	142	114	74	113½	99
91	87	87	94	58	94	88	157	122	80	118	102
97	89	97	98	61	100	90	167	126	84	121	104
101½	91	105	98	62	101½	91	175	126	86	122½	105
78	82	66	81	52	82	84	136	110	72	112	98
78	82	68	86	52	82	84	138	114	72	112	98
82	84	74	86	53	85	85	143	114	74	113½	99
85	85	76	90	55	88	86	146	118	76	115	100
88	86	82	90	56	91	87	151	118	78	116½	101

32 DEFENDANT'S EXHIBIT

	North Dakota					North Dakota		
	Distance	Present rate from New Salem	Proposed rate	Iowa rate for same distance	Illinois rate for same distance	Distance	Present rate from Blue Grass	Proposed rate
Steele, N. D.	77	89	55	88	86	81	90	56
Leonard, N. D.	244	152	106	140	117	247	156	106
Woods, N. D.	247	158	106	140	117	251	158	109
Davenport, N. D.	248	158	106	140	117	252	158	109
Warren, N. D.	244	154	106	140	117	248	158	106
Horace, N. D.	239	154	104	138	115	242	154	106
Osgood, N. D.	234	148	104	138	115	238	152	104
Cotters, N. D.	232	147	104	138	115	236	147	104
Durum, N. D.	138	107	72	112	98	142	107	74
Bloom, N. D.	140	107	72	112	98	144	107	74
Spiritwood, N. D.	146	109	76	115	100	150	113	76
Urbana, N. D.	150	112	76	115	100	153	115	76
Eckelson, N. D.	154	112	78	116½	101	153	116	80
Sanborn, N. D.	159	116	80	118	102	163	117	82
Rogers, N. D.	168	120	84	121	104	172	120	86
Dazey, N. D.	177	121	87	124	106	180	123	87
Wallum, N. D.	182	122	89	125½	107	186	126	91
Shepard, N. D.	191	122	93	128½	109	195	126	95
Hanaford, N. D.	185	122	89	125½	107	189	126	91
Cooperstown, N. D.	195	122	93	128½	109	199	129	95
Lovell, N. D.	199	126	95	130	110	203	132	97
Jessie, N. D.	204	130	97	132	111	208	134	97
Binford, N. D.	210	135	97	132	111	213	135	99
Mose, N. D.	215	141	99	134	112	219	141	99
McHenry, N. D.	221	141	101	136	113	225	141	101
Hobart, N. D.	163	115	82	119½	103	166	117	84
Berea, N. D.	165	116	82	119½	103	169	120	84
Valley City, N. D.	170	119	84	121	104	174	122	86
Gorman, N. D.	174	120	86	122½	105	177	124	87
Alta, N. D.	176	121	87	124	106	180	124	87
Oriska, N. D.	180	123	87	124	106	184	126	89
Tower City, N. D.	186	124	91	127	108	190	128	91
Buffalo, N. D.	192	128	93	128½	109	196	128	95
Magnolia, N. D.	198	131	95	130	110	201	131	97
Wheatland, N. D.	201	132	97	132	111	205	132	97
Glacis, N. D.	204	132	97	132	111	208	136	97
Casselton, N. D.	208	136	97	132	111	212	136	99
Myra, N. D.	214	137	99	134	112	218	141	99
Embden, N. D.	221	141	101	136	113	224	141	101
Fabian, N. D.	225	147	101	136	113	228	147	101
Alice, N. D.	225	147	101	136	113	231	147	104
Elizabeth, N. D.	233	148	104	138	115	236	152	104
Lucca, N. D.	239	154	104	138	115	239	154	104
Nome, N. D.	241	154	106	140	117	244	154	106
Eastedge, N. D.	245	154	106	140	117	248	158	106
Kathryn, N. D.	249	158	106	140	117	253	158	109
Hastings, N. D.	256	164	109	142	119	259	164	109
Litchville, N. D.	261	164	111	144	121	265	164	111
Marion, N. D.	268	167	111	144	121	272	167	111

1.—Continued.

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Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance
		Distance	Present rate from Sims	Proposed rate			Distance	Present rate from Lehigh	Proposed rate		
91	87	84	90	56	91	87	154	118	78	146½	101
140	117	254	156	109	142	119	321	174	126	156	130
142	119	255	158	109	142	119	324	178	126	156	130
142	119	256	158	109	142	119	325	180	126	156	130
140	117	252	158	109	142	119	321	178	126	156	130
140	117	246	154	106	140	117	316	174	124	154	129
138	115	242	152	106	140	117	311	170	124	154	129
138	115	240	151	104	138	115	309	168	120	152	129
113½	99	145	114	74	113½	99	215	128	99	134	112
113½	99	147	111	76	115	100	217	128	99	134	112
115	100	153	113	78	116½	101	223	132	101	136	113
116½	101	157	115	80	118	102	227	133	101	136	113
118	102	161	116	82	119½	103	231	134	104	138	115
119½	103	166	120	84	121	104	236	136	104	138	115
122½	105	176	126	87	124	106	245	138	106	140	117
124	106	184	123	89	125½	107	254	141	109	142	119
127	108	189	126	91	127	108	259	143	109	142	119
128½	109	199	136	95	130	110	268	143	111	144	121
127	108	192	126	93	128½	109	262	143	111	144	121
130	110	202	129	97	132	111	272	145	114	146	122
132	111	207	132	97	132	111	276	148	114	146	122
132	111	212	134	99	134	112	281	150	117	148	124
134	112	217	139	99	134	112	287	154	117	148	124
134	112	222	145	101	136	113	292	162	119	150	126
136	113	229	145	104	136	113	298	162	119	150	126
121	104	170	121	84	121	104	240	137	104	138	115
121	104	172	120	86	122½	105	242	139	106	140	117
122½	105	177	123	87	124	106	247	141	106	140	117
124	106	181	124	89	125½	107	251	142	109	142	119
124	106	183	124	89	125½	107	253	141	109	142	119
125½	107	188	127	91	127	108	258	146	109	142	119
127	108	193	128	93	128½	109	263	148	111	144	121
130	110	199	131	95	130	110	269	150	111	144	121
132	111	205	131	97	132	111	275	150	114	146	122
132	111	209	136	97	132	111	279	153	114	146	122
132	111	211	136	99	134	112	281	153	117	148	124
134	112	215	136	99	134	112	285	155	117	148	124
134	112	221	141	101	136	113	291	159	119	150	126
136	113	228	145	101	136	113	298	162	119	150	126
136	113	232	147	104	138	115	302	166	120	152	129
138	115	234	147	104	138	115	304	166	120	152	129
138	115	240	152	104	138	115	310	170	120	152	129
138	115	243	154	106	140	117	313	175	124	154	129
140	117	248	158	106	140	117	318	178	124	154	129
140	117	252	158	109	142	119	322	178	126	156	131
142	119	256	164	109	142	119	326	180	126	156	131
142	119	263	164	111	144	121	333	180	129	158	131
144	121	268	167	111	144	121	338	182	129	158	131
146	122	276	167	114	146	122	345	183	131	160	132

	North Dakota					North Dakota		
	Distance	Present rate from New Salem	Proposed rate	Iowa rate for same distance	Illinois rate for same distance	Distance	Present rate from Blue Grass	Proposed rate
Dalrymple, N. D.	210	136	97	132	111	214	136	99
Grouse, N. D.	84	89	56	91	87	85	90	56
Dawson, N. D.	85	89	56	91	87	89	93	58
Tappen, N. D.	91	92	59	97	89	94	94	59
Ladoga, N. D.	94	94	59	97	89	97	96	61
Crystal Springs, N. D.	98	96	61	100	90	102	96	62
Southdown, N. D.	104	98	62	101½	91	108	98	64
Medina, N. D.	107	98	64	103	92	110	98	64
Don, N. D.	110	99	64	103	92	114	101	65
Cleveland, N. D.	115	99	65	104½	93	119	101	67
Windsor, N. D.	119	101	67	106	94	123	101	68
Oswego, N. D.	123	104	68	107½	95	127	105	69
Eldridge, N. D.	128	104	69	109	96	132	105	71
Berner, N. D.	130	104	69	109	96	134	107	71
Jamestown, N. D.	135	104	71	110½	97	139	107	72
Parkhurst, N. D.	142	107	74	113½	99	145	107	74
Buchanan, N. D.	149	113	76	115	100	152	113	78
Pingree, N. D.	156	114	80	118	102	160	117	80
Edmunds, N. D.	163	118	82	119½	103	167	118	84
Melville, N. D.	170	123	84	121	104	173	123	86
Farquer Spur, N. D.	174	124	86	122½	105	177	128	87
Carrington, N. D.	179	129	87	124	106	182	129	89
Garland Spur, ... D.	183	130	89	125½	107	182	134	89
Dover, N. D.	187	130	91	127	108	191	134	93
Sykeston, N. D.	192	134	93	128½	109	195	134	93
Heaton, N. D.	199	138	95	130	110	203	138	97
Bowdon, N. D.	207	142	97	132	111	210	142	97
Chaseley, N. D.	210	142	97	132	111	215	142	99
Hurdsfield, N. D.	218	146	99	134	112	221	146	101
Goodrich, N. D.	227	146	101	136	113	230	150	101
Denhoff, N. D.	233	150	104	138	115	237	154	104
McClusky, N. D.	242	154	106	140	117	246	154	106
Mercer, N. D.	255	158	109	142	119	258	164	109
Turtle Lake, N. D.	264	164	111	144	121	267	167	111
Guptil, N. D.	183	130	89	125½	107	187	134	91
Barlow, N. D.	187	130	91	127	108	191	134	93
New Rockford, N. D.	195	134	93	128½	109	199	138	95
Divide, N. D.	205	138	97	132	111	209	138	97
Sheyenne, N. D.	206	138	97	132	111	210	142	97
Oberon, N. D.	215	142	99	134	112	218	146	99
Genin, N. D.	220	146	99	134	112	224	146	101
Flora, N. D.	225	146	101	136	113	229	150	101
Maddock, N. D.	230	150	101	136	113	234	150	104
Hesper, N. D.	235	150	104	138	115	239	154	104
Pendennis, N. D.	239	154	104	138	115	242	154	106
Rodes, N. D.	242	154	106	140	117	246	158	106
Lallie, N. D.	219	146	99	134	112	222	146	101
Minnewaukan, N. D.	225	146	101	136	113	229	150	101
Brinsmade, N. D.	234	150	104	138	115	237	154	104

1.—Continued. 35

Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance
		Distance	Present rate from Sims	Proposed rate			Distance	Present rate from Lehigh	Proposed rate		
134	112	218	140	99	134	112	287	156	117	148	124
91	87	88	93	53	94	88	159	119	80	118	102
94	88	92	93	59	97	89	162	119	82	119½	103
97	89	98	96	61	100	90	168	119	84	121	104
100	90	101	96	62	101½	91	171	120	86	122½	105
101½	91	105	96	62	101½	91	175	120	86	122½	105
103	92	111	98	64	104½	93	181	120	89	125½	107
103	92	114	98	65	104½	93	184	120	89	125½	107
104½	93	117	101	67	106	94	187	121	91	127	108
106	94	123	101	68	107½	95	192	121	93	128½	109
107½	95	125	105	69	109	96	196	122	95	130	110
109	96	130	105	69	109	96	200	124	95	130	110
110½	97	136	105	92	112	98	205	124	97	132	111
110½	97	138	107	72	112	98	208	125	97	132	111
112	98	143	107	74	113½	99	212	125	99	134	112
113½	99	149	111	76	115	100	219	128	99	134	112
116½	101	156	113	80	118	102	226	133	101	136	113
118	102	164	117	82	119½	103	234	138	104	138	115
121	104	170	121	84	121	104	240	142	104	138	115
122½	105	177	127	87	124	106	247	147	106	140	117
124	106	181	128	89	125½	107	251	152	109	142	119
125½	107	186	129	91	127	108	256	155	109	142	119
125½	107	186	134	91	127	108	260	164	109	142	119
128½	109	194	134	93	128½	109	264	164	111	144	121
128½	109	199	138	95	130	110	269	167	111	144	121
132	111	206	142	97	132	111	276	169	114	146	122
132	111	214	142	99	134	112	284	169	117	148	124
134	112	219	146	99	134	112	289	171	117	148	124
136	113	225	136	101	136	113	295	171	119	150	126
136	113	234	150	104	138	115	304	174	120	152	129
138	115	240	154	104	138	115	310	175	120	152	129
140	117	250	158	106	140	117	319	178	124	154	129
142	119	262	164	111	144	121	332	180	129	158	131
144	121	271	167	114	146	122	341	183	131	160	134
127	108	191	134	93	128½	109	261	164	111	144	121
128½	109	194	134	93	128½	109	264	164	111	144	121
130	110	202	138	97	132	111	272	167	114	146	122
132	111	212	142	99	134	112	278	169	114	146	122
132	111	213	142	99	134	112	283	169	117	148	124
134	112	222	146	101	136	113	292	171	119	150	126
136	113	227	150	101	136	113	297	174	119	150	126
136	113	232	150	104	138	115	302	174	120	152	129
138	115	237	154	104	138	115	307	175	120	152	129
138	115	242	154	106	140	117	312	175	124	154	129
140	117	246	154	106	140	117	316	175	124	154	129
140	117	249	158	106	140	117	319	178	124	154	129
136	113	226	146	101	136	113	296	171	119	150	126
136	113	233	150	104	138	115	303	174	120	152	129
138	115	241	154	106	140	117	311	175	124	154	129

36 DEFENDANT'S EXHIBIT

	North Dakota					North Dakota		
	Distance	Present rate from New Salem	Proposed rate	Iowa rate for same distance	Illinois rate for same distance	Distance	Present rate from Blue Grass	Proposed rate
Leeds, N. D.	244	154	106	140	117	247	158	106
Greene, N. D.	243	137	99	134	112	247	141	99
Mapleton, N. D.	216	138	99	131	112	226	142	99
Canfield, N. D.	220	142	99	134	112	224	142	101
Haggart, N. D.	223	142	101	136	113	227	146	101
Fargo, N. D.	228	146	101	136	113	232	146	101
Grand Forks, N. D.	350	185	131	160	131	354	185	131
Bolack, N. D.	355	185	131	162	134	359	187	131
Kelly's, N. D.	360	187	134	162	134	364	187	136
Meckinock, N. D.	366	190	136	164	137	370	190	136
Honeyford, N. D.	372	190	139	166	137	376	192	139
Gilby, N. D.	375	190	139	166	137	379	192	139
Johnstown, N. D.	380	192	139	166	137	384	193	141
Forest River, N. D.	384	192	141	168	139	388	194	141
Voss, N. D.	390	194	141	168	139	394	194	144
Kellogg, N. D.	395	194	144	170	139	399	196	144
Grafton, N. D.	399	196	144	170	139	403	196	147
Casbel, N. D.	406	198	147	174	142	410	198	147
Elora, N. D.	410	198	147	174	142	414	198	149
Drayton, N. D.	414	198	149	174	142	418	201	149
Pittsburgh, N. D.	419	201	149	174	142	423	201	150
Bowesmont, N. D.	423	201	150	178	145	427	203	150
Joliette, N. D.	433	203	154	178	145	437	206	154
McArthur, N. D.	437	206	154	178	145	441	206	155
Pembina, N. D.	441	206	156	182	148	448	208	156

1$_{4}$—Continued. 37

Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance	North Dakota			Iowa rate for same distance	Illinois rate for same distance
		Distance	Present rate from Sims	Proposed rate			Distance	Present rate from Lehigh	Proposed rate		
140	117	254	158	109	142	119	321	178	126	156	131
138	112	241	141	101	136	113	296	158	119	150	126
134	112	234	142	101	136	113	294	160	119	150	126
136	113	228	145	101	136	113	288	163	119	150	126
136	113	231	146	104	138	115	291	165	120	152	129
138	115	236	146	104	138	115	296	165	120	152	129
162	134	358	187	131	163	....	428	203	150	178	145
162	134	360	187	136	164	....	433	203	154	178	145
162	137	368	190	136	164	....	438	206	154	178	145
164	137	374	190	139	166	....	444	206	156	182	148
166	137	380	192	139	166	....	449	208	156	182	148
166	137	383	192	141	168	....	453	208	159	182	148
168	139	388	194	141	168	....	458	210	159	182	148
168	139	392	194	144	170	....	462	210	161	186	150
170	139	398	196	144	170	....	468	213	161	186	150
170	139	403	196	147	174	....	473	213	161	186	150
174	142	407	198	147	174	....	477	215	164	186	150
174	142	414	198	149	174	....	484	215	166	190	153
174	142	418	202	149	174	....	488	217	166	190	153
174	142	423	204	150	178	....	492	217	169	190	153
178	145	427	208	150	178	....	497	219	169	190	153
178	145	431	208	154	178	....	501	219	....	....	....
178	145	441	206	156	182	....	511	223	....	....	....
182	148	445	206	156	182	....	515	223	....	....	....
182	148	452	208	159	182	....	522	225	....	....	....

38 DEFENDANT'S EXHIBIT 1.—Continued.

	North Dakota				
	Distance	Present rate from Zenith	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Eland, N. D.	10	40	30	34	40
South Heart, N. D.	4	30	30	30	32
Belfield, N. D.	5	30	30	30	32
Fryburg, N. D.	11	40	35	38	45
Sully Springs, N. D.	16	50	37	42	50
Scoria, N. D.	20	50	37	42	50
Medora, N. D.	24	50	38	46	54
Little Missouri, N. D.	15	50	38	46	54
Waldron, N. D.	30	50	40	50	58
Andrews, N. D.		50			
Demores, N. D.	36	50	43	58	66
Sentinel Butte, N. D.	41	68	44	62	72
Chama, N. D.	45	68	44	62	72
Beach, N. D.	49	75	46	66	76
Dickinson, N. D.	15	40	35	38	45
Gladstone, N. D.	26	50	40	50	58
Knowlton, N. D.	29	50	40	50	58
Taylor, N. D.	34	50	41	54	63
Richardton, N. D.	40	68	45	58	68
Antelope, N. D.	45	55	44	62	72
Knife River, N. D.	51	75	47	70	78
Hebron, N. D.	55	75	47	70	78
Eagles Nest, N. D.	62	81	50	78	85
Glen Ullen, N. D.	68	85	52	85	84
Kurtz, N. D.	72	85	53	85	85
Curlew, N. D.	79	85	55	88	86
Almont, N. D.	85	85	56	91	87
Feland's Spur, N. D.	88	85	58	94	88
Sims, N. D.	89	85	58	94	88
Blue Grass, N. D.	93	85	59	97	89
New Salem, N. D.	97	85	61	100	90
Sedalia, N. D.	100	85	61	100	90
Judson, N. D.	103	85	63	101½	91
Sweet Briar, N. D.	109	85	64	103	93
Marmot, N. D.	116	85	67	106	94
Sunnyside, N. D.	121	85	68	107½	95
Mandan, N. D.	125	85	68	107½	95
Bismarck, N. D.	130	90	69	109	96
Apple Creek, N. D.	138	114	72	113	98
Burleigh, N. D.	143	114	74	113½	99
McKenzie, N. D.	149	118	76	115	100
Bessoba, N. D.	161	122	82	119½	103
Hazelton, N. D.	171	126	85	121	106
Brady, N. D.	176	134	91	127	108
Linton, N. D.	191	134	93	128½	109
Sterling, N. D.	155	122	78	116½	101
Angora, N. D.	148	122	80	118	102
Driscoll, N. D.	163	122	82	119½	103
Geneva, N. D.	166	126	84	121	104
Rankin, N. D.	171	126	85	122½	105

DEFENDANT'S EXHIBIT 1.—Continued. 39

	North Dakota				
	Distance	Present rate from Zenith	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Steele, N. D.	174	126	86	122½	105
Reeves Spur, N. D.	230	135	104	138	115
Ypsilanti, N. D.	245	139	106	140	117
Montpelier, N. D.	253	142	108	142	119
Adrian, N. D.	250	140	109	142	119
Dickey, N. D.	265	153	111	144	121
Grand Rapids, N. D.	274	156	114	146	122
La Moure, N. D.	284	157	117	148	124
Grouse, N. D.	178	125	87	124	105
Dawson, N. D.	182	127	89	125½	107
Tappen, N. D.	187	127	91	127	108
Lodoga, N. D.	191	127	93	128½	109
Crystal Springs, N. D.	195	127	93	128½	109
Southdown, N. D.	261	127	97	132	111
Medina, N. D.	263	127	97	132	111
Don, N. D.	268	132	97	132	111
Cleveland, N. D.	252	132	99	134	112
Windsor, N. D.	216	132	99	134	112
Oswego, N. D.	220	132	99	134	112
Eldridge, N. D.	225	132	101	136	113
Berner, N. D.	227	132	101	136	113
Jamestown, N. D.	232	133	103	138	115
Parkhurst, N. D.	238	135	104	138	115
Buchanan, N. D.	245	140	106	140	117
Pingree, N. D.	253	145	109	142	119
Edmunds, N. D.	250	151	109	142	119
Melville, N. D.	267	159	114	144	121
Farquer, Spur, N. D.	272	161	114	146	122
Carrington, N. D.	176	164	114	146	122
Garland Spur, N. D.	280	169	114	146	122
Dover, N. D.	284	169	117	148	124
Sykeston, N. D.	289	171	117	148	124
Heaton, N. D.	296	171	119	150	126
Bowdon, N. D.	303	174	120	152	129
Chaseley, N. D.	309	175	120	152	129
Hurdsfield, N. D.	314	175	124	154	129
Goodrich, N. D.	324	178	126	156	131
Denhoff, N. D.	332	184	129	158	131
McGinsky, N. D.	339	183	129	158	131
Mercer, N. D.	352	185	134	162	134
Turtle Lake, N. D.	361	187	136	164	137
Guptil, N. D.	280	169	114	146	122
Barlow, N. D.	284	169	117	148	124
New Bedford, N. D.	292	171	119	150	126
Divide, N. D.	298	174	119	150	126
Sheyenne, N. D.	303	174	120	152	129
Oberon, N. D.	311	175	124	154	129
Genin, N. D.	317	178	124	154	129
Flora, N. D.	322	178	126	156	131
Maddock, N. D.	327	180	126	156	131
Hesper, N. D.	332	180	129	158	131

40 DEFENDANT'S EXHIBIT 1.—Continued.

	North Dakota				
	Distance	Present rate from Zenith	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Pendennis, N. D.	336	180	129	158	131
Rhodes, N. D.	339	183	129	158	131
Lallie, N. D.	317	175	124	154	129
Minnewaukan, N. D.	322	178	126	156	131
Brinsmade, N. D.	331	180	129	158	131
Leeds, N. D.	341	183	131	160	134
Leonard, N. D.	340	179	129	158	131
Woods, N. D.	344	183	131	160	134
Davenport, N. D.	345	185	131	160	134
Warren, N. D.	341	183	131	160	134
Horace, N. D.	335	179	129	158	131
Osgood, N. D.	331	175	129	158	131
Cotters, N. D.	329	173	126	156	131
Berlin, N. D.	291	171	119	150	126
Medberry, N. D.	298	174	119	150	126
Edgeley, N. D.	303	174	120	152	126
Deisem, N. D.	308	175	120	152	129
Jud, N. D.	315	175	124	154	129
Alfred, N. D.	323	178	126	156	131
Gackle, N. D.	329	180	126	156	131
Streeter, N. D.	341	183	134	160	134
Oakes Jct., N. D.	287	157	117	148	124
Glover, N. D.	294	161	119	150	126
Oakes, N. D.	302	165	120	152	129
Janet, N. D.	306	168	120	152	129
Crete, N. D.	310	168	120	152	129
Stirum, N. D.	317	169	124	154	129
Gwinner, N. D.	324	171	126	156	131
Hove, N. D.	329	174	126	156	131
Milnor, N. D.	334	174	129	158	131
DeLamere, N. D.	341	177	131	160	134
Star Lake, N. D.	344	182	131	160	134
Wyndmere, N. D.	351	182	134	162	134
Barney, N. D.	357	186	134	162	134
Mooreton, N. D.	363	187	136	164	137
Downing, N. D.	364	187	136	164	137
Fairview Jct., N. D.	365	187	136	164	137
Adams, N. D.	369	190	136	164	137
Woodruff, N. D.	371	190	139	166	137
Van Pelts, N. D.	372	190	139	166	137
Keystone Jct., N. D.	373	190	139	166	137
Great Bend, N. D.	374	190	139	166	137
Warner, N. D.	377	192	139	166	137
Bayne, N. D.	379	192	139	166	137
Farmington, N. D.	369	190	136	164	137
Stevensons, N. D.	371	190	139	166	137
Wahpeton, N. D.	376	192	139	166	137
Breckenridge, Minn.	377	192	139	166	137
Verona, N. D.	293	157	119	150	126
Englevale, N. D.	301	160	120	152	129

Defendant's Exhibit 1.—Continued. 41

	North Dakota				
	Distance	Present rate from Zenith	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Elliott, N. D.	306	160	120	152	129
Lisbon, N. D.	313	161	124	154	129
Buttzville, N. D.	319	165	124	154	129
Sheldon, N. D.	328	171	126	156	131
Coburn, N. D.	334	175	129	158	131
Durum, N. D.	235	135	104	138	115
Bloom, N. D.	237	135	104	138	115
Spiritwood, N. D.	243	139	106	140	117
Urbana, N. D.	247	140	106	140	117
Eckelson, N. D.	250	140	106	140	117
Sanborn, N. D.	256	147	109	142	119
Rogers, N. D.	265	147	111	144	121
Dazey, N. D.	273	147	114	146	122
Walum, N. D.	279	147	114	146	124
Shepard, N. D.	288	147	117	148	124
Hannaford, N. D.	282	147	117	148	124
Cooperstown, N. D.	292	148	119	150	126
Lovell, N. D.	295	151	119	150	126
Jessie, N. D.	301	154	120	152	129
Binford, N. D.	306	158	120	152	129
Mose ,N. D.	312	166	124	154	129
McHenry, N. D.	318	166	124	154	129
Hobart, N. D.	259	148	109	142	119
Berea, N. D.	262	148	111	144	127
Valley City, N. D.	267	149	111	144	127
Gorman, N. D.	210	150	111	144	127
Alta, N. D.	273	150	114	146	122
Oriska, N. D.	277	150	114	146	122
Tower City, N. D.	283	152	117	148	124
Buffalo, N. D.	289	154	117	148	124
Magnolia, N. D.	294	154	119	150	126
Wheatland, N. D.	298	157	119	150	126
Glacis, N. D.	304	157	120	152	129
Casselton, N. D.	305	160	120	152	129
Myra, N. D.	311	163	124	154	129
Enlbden, N. D.	317	166	124	154	129
Fabian, N. D.	322	170	126	154	129
Alice, N. D.	324	170	126	156	131
Elizabeth, N. D.	329	175	126	156	131
Lucca, N. D.	333	180	129	158	131
Nome, N. D.	337	183	129	158	131
Eastedge, N. D.	341	183	131	160	134
Kathryn, N. D.	346	183	131	160	134
Hastings, N. D.	352	185	134	162	134
Litchville, N. D.	358	187	134	162	134
Marion, N. D.	365	187	136	164	137
Dalrymple, N. D.	307	160	120	152	129

42 DEFENDANT'S EXHIBIT 1.—Continued.

	North Dakota				
	Distance	Present rate from Bismarck	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Eland, N. D.	129	....	67	106	94
South Heart, N. D.	127	....	67	109	96
Belfield, N. D.	136	....	72	112	98
Fryburg, N. D.	141	....	74	113½	99
Sully Springs, N. D.	147	....	76	115	100
Scoria, N. D.	150	....	76	115	100
Medora, N. D.	155	....	78	116½	10?
Little Missouri, N. D.	156	....	80	118	10?
Waldron, N. D.	161	....	82	119½	103
Andrews, N. D.	....	....	....	....	....
De Mores, N. D.	166	....	84	121	104
Sentinel Butte, N. D.	172	....	86	122½	105
Chama, N. D.	175	....	86	122½	105
Beach, N. D.	180	....	87	124	106
Dickinson, N. D.	116	....	67	106	94
Gladstone, N. D.	104	....	62	101½	91
Knowlton, N. D.	101	....	62	101½	91
Taylor, N. D.	96	....	61	100	90
Richardton, N. D.	91	....	59	97	89
Antelope, N. D.	85	....	56	91	87
Knife River, N. D.	79	....	55	88	86
Hebron, N. D.	76	....	55	88	86
Eagles Nest, N. D.	69	....	52	82	84
Glen Ullen, N. D.	62	....	50	78	82
Kurtz, N. D.	58	....	49	74	80
Curlew, N. D.	52	....	47	70	78
Almont, N. D.	46	....	46	66	76
Felands Spur, N. D.	42	....	44	62	72
Sims, N. D.	41	....	44	62	72
Blue Grass, N. D.	37	....	43	58	68
New Salem, N. D.	34	....	41	54	63
Sedalia, N. D.	30	....	40	50	58
Judson, N. D.	27	....	40	50	58
Sweet Briar, N. D.	22	....	38	46	54
Marmot, N. D.	14	....	35	38	45
Sunnyside, N. D.	9	....	30	34	40
Mandan, N. D.	6	40	30	34	40
Bismarck, N. D.	....	....	....	....	....
Apple Creek, N. D.	8	40	30	34	40
Burleigh, N. D.	13	40	35	38	45
McKenzie, N. D.	18	50	37	42	50
Bessoba, N. D.	31	50	41	54	63
Hazelton, N. D.	46	75	46	66	76
Brofy, N. D.	56	75	49	74	80
Linton, N. D.	64	81	50	78	82
Sterling, N. D.	25	50	38	46	54
Angora, N. D.	17	59	37	42	50
Driscoll, N. D.	33	59	41	54	63
Geneva, N. D.	35	68	41	54	63

DEFENDANT'S EXHIBIT 1.—Continued. 43

	North Dakota				
	Distance	Present rate from Bismarck	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Rankin, N. D.	41	68	44	62	72
Steele, N. D.	43	68	44	62	72
Grouse, N. D.	48	75	46	66	76
Dawson, N. D.	51	75	47	70	78
Tappen, N. D.	57	81	49	74	80
Ladoga, N. D.	60	81	49	74	80
Crystal Springs, N. D.	64	81	50	78	82
Southdown, N. D.	70	86	52	82	84
Medina, N. D.	73	86	53	85	85
Don, N. D.	76	90	55	88	86
Cleveland, N. D.	82	90	56	91	87
Windsor, N. D.	85	90	56	91	87
Oswego, N. D.	89	94	58	94	88
Eldridge, N. D.	95	94	59	97	89
Berner, N. D.	97	98	61	100	90
Jamestown, N. D.	102	98	62	101½	91
Parkhurst, N. D.	108	102	64	103	92
Buchanan, N. D.	115	102	65	104½	93
Pingree, N. D.	123	106	68	107½	95
Edmunds, N. D.	129	110	69	109	96
Melville, N. D.	136	110	72	112	98
Farquer Spur, N. D.	141	114	74	113½	99
Carrington, N. D.	145	114	74	113½	99
Garlands Spur, N. D.	149	118	76	115	100
Dover, N. D.	153	118	78	116¼	101
Sykeston, N. D.	158	122	80	118	102
Heaton, N. D.	165	122	82	119½	103
Bowdon, N. D.	173	126	86	122½	105
Chaseley, N. D.	178	130	87	124	106
Hurdsfield, N. D.	184	130	89	125½	107
Goodrich, N. D.	193	134	93	128½	109
Denhoff, N. D.	199	138	95	130	110
McClusky, N. D.	208	142	97	132	111
Mercer, N. D.	221	148	101	136	113
Turtle Lake, N. D.	230	150	101	136	113
Guptil, N. D.	150	118	76	115	100
Barlow, N. D.	153	118	78	116¼	101
New Rockford, N. D.	161	122	82	119½	103
Divide, N. D.	167	126	84	121	104
Sheyenne, N. D.	172	126	86	122½	105
Oberon, N. D.	181	130	89	125½	107
Genin, N. D.	186	130	91	127	108
Flora, N. D.	191	134	93	128½	109
Maddock, N. D.	196	134	95	130	110
Hesper, N. D.	201	138	97	132	111
Pendennis, N. D.	205	138	97	132	111
Rhodes, N. D.	208	142	97	132	111
Lallie, N. D.	185	130	89	125½	107
Minnewaukan, N. D.	192	130	93	128½	109
Brinsmade, N. D.	200	138	95	130	110
Leeds, N. D.	219	142	97	132	111

44 DEFENDANT'S EXHIBIT 1.—Continued.

	North Dakota				
	Distance	Present rate from Bismarck	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Reeves Spur, N. D.	108	102	64	103	92
Ypsilanti, N. D.	115	102	65	104½	93
Montpelier, N. D.	121	105	68	107½	95
Adrian, N. D.	128	110	69	109	96
Dickey, N. D.	134	110	71	110½	97
Grand Rapids, N. D.	143	114	74	113½	99
La Moure, N. D.	151	118	78	116½	101
Berlin, N. D.	161	122	82	119½	103
Medberry, N. D.	167	122	84	121	104
Edgeley, N. D.	173	126	86	122½	105
Deisem, N. D.	177	130	87	124	106
Jud, N. D.	185	130	89	125½	107
Alfred, N. D.	192	134	93	128½	109
Gackle, N. D.	199	138	95	130	110
Strector, N. D.	210	142	97	132	111
Oakes Jct., N. D.	156	118	80	118	102
Glover, N. D.	164	122	82	119½	103
Oakes, N. D.	171	126	86	122½	105
Janet, N. D.	175	126	86	122½	105
Crete, N. D.	183	130	89	125½	107
Stirum, N. D.	187	130	91	127	108
Gwinner, N. D.	194	134	93	128½	109
Hove, N. D.	199	138	95	130	110
Milnor, N. D.	204	138	97	132	111
De Lamere, N. D.	210	142	97	132	111
Star Lake, N. D.	214	146	99	134	112
Wyndmere, N. D.	220	146	99	134	112
Barney, N. D.	226	146	101	136	113
Mooreton, N. D.	232	150	104	138	115
Downing, N. D.	234	150	104	138	115
Fairview, Jct., N. D.	235	150	104	138	115
Adams, N. D.	239	154	140	138	115
Woodruff, N. D.	240	154	104	138	115
Van Pelts, N. D.	242	154	106	140	117
Keystone Jct., N. D.	243	154	106	140	117
Great Bend, N. D.	243	154	106	140	117
Warner, N. D.	247	158	106	140	117
Bayne, N. D.	248	158	106	140	117
Farmington, N. D.	238	154	104	138	115
Stevensons, N. D.	241	154	106	140	117
Wahpeton, N. D.	245	154	106	140	117
Breckenridge, Minn.	246	154	106	140	117
Verona, N. D.	162	122	82	119½	103
Englevale, N. D.	170	126	84	121	104
Elliott, N. D.	175	126	86	122½	105
Lisbon, N. D.	183	130	89	128½	107
Buttzville, N. D.	188	134	91	127	108
Sheldon, N. D.	197	138	95	130	110
Coburn, N. D.	204	138	97	132	111

DEFENDANT'S EXHIBIT 1.—Continued.

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	North Dakota				
	Distance	Present rate from Bismarck	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Leonard, N. D.	210	142	97	132	111
Woods, N. D.	214	142	99	134	112
Davenport, N. D.	215	142	99	134	112
Warren, N. D.	211	142	99	134	112
Horace, N. D.	205	138	97	132	111
Osgood, N. D.	201	138	97	132	111
Cotters, N. D.	199	138	95	130	110
Durum, N. D.	104	102	62	101½	91
Bloom, N. D.	106	102	64	103	92
Spiritwood, N. D.	112	102	65	104½	93
Urbana, N. D.	116	106	67	106	94
Eckelson, N. D.	120	106	67	106	94
Sanborn, N. D.	125	106	68	107½	95
Rogers, N. D.	135	110	71	110½	97
Dazey, N. D.	143	114	74	113½	99
Walum, N. D.	149	118	76	115	100
Shepard, N. D.	158	118	80	118	102
Hannaford, N. D.	151	118	78	116½	101
Cooperstown, N. D.	161	122	82	119½	103
Lovell, N. D.	166	124	84	121	104
Jessie, N. D.	170	126	84	121	104
Binford, N. D.	176	126	87	124	106
Mose, N. D.	181	130	89	125½	107
McHenry, N. D.	188	130	91	127	108
Hobart, N. D.	129	110	69	109	96
Berea, N. D.	131	110	71	110½	97
Valley City, N. D.	136	114	72	112	98
Gorman, N. D.	140	114	72	112	98
Alta, N. D.	142	114	74	113½	99
Oriska, N. D.	147	118	76	115	100
Tower City, N. D.	152	118	78	116½	101
Buffalo, N. D.	158	122	80	118	102
Magnolia, N. D.	164	122	82	119½	103
Wheatland, N. D.	168	126	84	121	104
Glacie, N. D.	170	126	84	121	104
Casselton, N. D.	174	126	86	122½	105
Myra, N. D.	180	130	87	124	106
Embden, N. D.	187	134	91	127	108
Fabian, N. D.	191	134	93	128½	109
Alice, N. D.	193	134	93	128½	109
Elizabeth, N. D.	199	138	95	130	110
Lucca, N. D.	202	138	95	130	110
Nome, N. D.	207	142	97	132	111
Eastedge, N. D.	211	142	99	134	112
Kathryn, N. D.	215	142	99	134	112
Hastings, N. D.	222	146	101	136	113
Litchville, N. D.	227	150	101	136	113
Marion, N. D.	234	150	104	138	115
Dalrymple, N. D.	177	130	87	124	105

46 DEFENDANT'S EXHIBIT 1.—Continued.

	North Dakota				
	Distance	Present rate from Zenith	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Greene, N. D.	311	162	124	154	129
Mapleton, N. D.	314	164	124	154	129
Canfield, N. D.	318	167	124	154	129
Haggart, N. D.	321	169	126	156	131
Fargo, N. D.	326	169	126	156	131
Grand Forks, N. D.	418	208	156	182	148
Bollack, N. D.	453	208	159	182	148
Kelly's, N. D.	458	210	159	182	148
Meckinock, N. D.	464	210	161	186	150
Honeyford, N. D.	470	213	161	186	150
Gilby, N. D.	473	213	164	186	150
Johnstown, N. D.	478	215	164	186	150
Forest River, N. D.	482	215	166	190	154
Voss, N. D.	488	217	166	190	153
Kellogg, N. D.	493	217	169	190	153
Grafton, N. D.	497	217	169	190	153
Cashel, N. D.	504	219	....	....	....
Flora, N. D.	508	221	....	....	....
Drayton, N. D.	512	221	....	....	....
Pittsburg, N. D.	517	223	....	....	....
Bowesmont, N. D.	521	223	....	....	....
Joliette, N. D.	531	227	....	....	....
McArthur, N. D.	535	227	....	....	....
Pembina, N. D.	542	229	....	....	....

DEFENDANT'S EXHIBIT 1.—Continued. 47

	North Dakota				
	Distance	Present rate from Bismarck	Proposed rate	Iowa rate for same distance	Illinois rate for same distance
Greene, N. D.	180	130	87	121	106
Mapleton, N. D.	182	130	89	125½	107
Canfield, N. D.	186	130	91	127	108
Haggart, N. D.	189	134	91	127	108
Fargo, N. D.	191	134	93	128½	109
Grand Forks, N. D.	316	175	124	154	129
Rolack N. D.	321	178	126	156	131
Kelly's, N. D.	326	180	126	156	131
Mackintosh, N. D.	332	180	129	158	131
Honeyford, N. D.	338	183	129	158	131
Gilby, N. D.	341	183	131	160	134
Johnstown, N. D.	346	183	131	160	134
Forest River, N. D.	350	185	131	160	134
Voss, N. D.	356	187	134	162	134
Kellogg, N. D.	361	187	136	164	137
Grafton, N. D.	365	187	136	164	137
Cashel, N. D.	372	190	139	166	137
Elora, N. D.	376	190	139	166	137
Drayton, N. D.	380	192	139	166	137
Pittsburg, N. D.	385	192	141	168	139
Bowesmont, N. D.	389	194	141	168	139
Joliette, N. D.	399	196	144	170	139
McArthur, N. D.	402	196	147	174	142
Pembina, N. D.	409	198	147	174	142

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DEFENDANT'S EXHIBIT 2.

North Dakota Lignite Coal Rates.

0	10	30	180	185	89
10	15	35	185	190	91
15	20	37	190	195	93
20	25	38	195	200	95
25	30	40	200	210	97
30	35	41	210	220	99
35	40	43	220	230	101
40	45	44	230	240	104
45	50	46	240	250	106
50	55	47	250	260	109
55	60	49	260	270	111
60	65	50	270	280	114
65	70	52	280	290	117
70	75	53	290	300	119
75	80	55	300	310	120
80	85	56	310	320	124
85	90	58	320	330	126
90	95	59	330	340	129
95	100	61	340	350	131
100	105	62	350	360	134
105	110	64	360	370	136
110	115	65	370	380	139
115	120	67	380	390	141
120	125	68	390	400	144
125	130	69	400	410	147
130	135	71	410	420	149
135	140	72	420	430	151
140	145	74	430	440	154
145	150	76	440	450	156
150	155	78	450	460	159
155	160	80	460	470	161
160	165	82	470	480	164
165	170	84	480	490	166
170	175	86	490	500	169
175	180	87			

100 mile rate is 62.
200 mile rate is 97, inc. 35.
300 mile rate is 120, inc. 23.
400 mile rate is 147, inc. 27.
500 mile rate is 169, inc. 22.

DEFENDANT'S EXHIBIT 3. 49

	North Dakota Present Rate	North Dakota Proposed Rate	Iowa Commissions Rate	Illinois Commissions Rate	Minnesota Legislative Rate in Litigation
25 m.	50 New Salem to Kurtz	38	46 or 15 per cent higher	54 or 35 per cent higher	54
50 m.	75 New Salem to McKenzie (52 m.)	46	66 or 40 per cent higher	76 or 63 per cent higher	62 or 31 per cent higher
75 m.	86 New Salem to Rankin (75 m.)	53	85 or 72 per cent higher	85 or 72 per cent higher	72 or 30 per cent higher
100 m.	96 New Salem to Crystal Springs (98 m.)	61	100 or 61 per cent higher	90 or 45 per cent higher	82 or 32 per cent higher
200 m.	135 New Salem to Oakes (205 m.)	95	130 or 34 per cent higher	110 or 13 per cent higher	116 or 19 per cent
300 m.	166 Lehigh to Fabian (302 m.) ...	119	150 or 25 per cent higher	126 or 5 per cent higher	154 or 28 per cent higher
400 m.	196 New Salem to Grafton (399 m.)	144	170 or 15 per cent higher	No rate	172 or 17 per cent higher
500 m.	217 Zenith to Grafton (487 m.) ..	169	190 or 12 per cent higher	No rate	

DEFENDANT'S EXHIBIT 4.

COMPARISON OF COAL RATES

	DISTANCES											
	25	50	75	100	125	150	175	200	250	300	350	400
	RATES IN CENTS PER TON											
North Dakota—Present	50	75	85	96	101	113	123	138	158	174	185	196
North Dakota—Proposed	38	46	53	61	68	76	86	95	106	119	131	144
Distance Tariff Rates—												
Iowa	56	66	85	100	107½	115	122½	130	140	150	160	170
Illinois	54	76	85	90	95	100	105	110	117	126	134	139
Missouri	50	70	85	100	110	125	135	150	165	185	205	215
Kansas	90	115	140	150	195	215	230	245	280	325	380	410
Kansas City, Mo.	50	75	90	124	132	132	132	146	160	195	240	250
Rock Springs, Wyo.	150	150	150	150	150	200	250	275	300	300	450	456
Pittsburg, Kan.	53	70	75	75	84	100	100	100	136	175	192	192
Rates from Terminal and Producing Points—												
Rates from points in Nebraska set by I. C. C.												
From Rock Springs, Wyo.	....	....	....	....	....	....	....	....	....	....	....	300
From Hanna, Wyo.	....	....	....	....	....	....	....	....	225	....	250	
Eastern Rates—												
Indiana	25	45	60	60	70	70	75	100	130	135	145	150
Ohio	30	60	60	65	80	90	100	100	100	135	135	165
Pennsylvania	....	....	..	125	125	130	135	135	135	145	145	190
To Philadelphia, Pa., from—												
Huntingdon	....	....	....	....	....	....	....	160				
Altoona	....	....	....	....	....	....	....	....	160			
Johnstown	....	....	....	....	....	....	....	....	....	160		
Hillside	....	....	....	....	....	....	....	....	....	160		
Pittsburg	....	....	....	....	....	....	....	....	....	....	200	

TRAFFIC MANAGER'S OFFICE,
NORTHERN PACIFIC RY.,

51 DEFENDANT'S EXHIBIT 5.

	Grain rate to Minneapolis per 2,000 lbs.	North Dakota legislative coal rate per 2,000 lbs.
25 miles	$1.00	$ .38
50 miles	1.40	.46
75 miles	1.40	.53
100 miles	1.60	.61
125 miles	1.70	.68
150 miles	1.90	.76
175 miles	2.00	.86
200 miles	2.00	.95
225 miles	2.20	1.01
250 miles	2.30	1.06
275 miles	2.50	1.14
300 miles	2.60	1.19

On the 24th day of November, 1908, the following testimony was taken and proper return made thereof to the said Supreme Court:

Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA, on the Relation of T. F. McCue, Attorney General,
vs.
NORTHERN PACIFIC RAILWAY COMPANY.

Testimony in behalf of the defendants in the above entitled causes resumed at the offices of the Northern Pacific Railway Company, in St. Paul, Minnesota, this 24th day of November, A. D. 1908.

Present on behalf of the plaintiff: Messrs. T. F. McCue and Edward P. Kelly.

On behalf of the defendant, Northern Pacific Railway Company, Mr. C. W. Bunn; on behalf of the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Mr. A. H. Bright; on behalf of the defendant, Great Northern Railway Company, Mr. W. R. Begg.

Thereupon the following proceedings were had:

WILLIAM G. JOHNSON, a witness produced on behalf of the defendants, after being duly sworn, testified as follows in answer to questions by Mr. Bunn:

Q. Mr. Johnson, you reside in St. Paul?
A. Yes, sir.
52 Q. And what is your occupation?

A. Assistant comptroller of the Northern Pacific Railway Company.

Q. How long have you been connected with the accounting department of that company?

A. Well, I entered the service of the Northern Pacific in 1884, in the accounting department, and with one or two interruptions I have been in the service ever since.

Q. You are the second officer in the accounting department of that company now?

A. Yes, sir.

Q. Mr. Johnson, have you caused to be prepared from the train sheets of the Northern Pacific a statement of the tonnage of North Dakota coal moved by that company during the year ending June 30th, 1908?

A. Our auditor of freight receipts drew from the freight abstracts, not the train sheets, the number of carload shipments of lignite coal forwarded from all stations in North Dakota to all other stations, for the year ending June 30th, 1908.

Q. What are the freight abstracts?

A. The freight abstracts and summaries showing the amount of business moved from each station to each other station on the railroad, prepared by the agents.

Q. Prepared by the station agents and sent in here to the general offices?

A. Yes, sir.

Q. They are part of the regular books and records of the company, not kept for that particular case, but kept in its usual business?

A. Used for the general accounting purposes of the company.

Q. And all the accounts of the company are founded upon them?

A. Yes, sir.

Q. And other things?

A. Yes, sir.

Q. Now, who did this work?

A. Our auditor of freight receipts, or under his direction.

Q. He and the employes who did it are in this building, are they?

—. Yes, sir.

Mr. BUNN: I might say in this connection that these freight abstracts and these employes who did this manual work are in this building, and you are welcome to call on them, or look at the documents and papers if you like.

Q. (Showing witness paper). Is this the statement referred to?

A. Yes, sir.

Q. I observe that the statement is confined to Lehigh and Bismarck; you may state whether there were cars produced at other places, and why a detail of these places is not given in the statement?

A. In addition to the lignite coal business forwarded from Lehigh and received by the Northern Pacific from the Soo line at Bismarck, we also had some shipments from Sims and New Salem.

53 Q. How many cars from Sims and New Salem?

A. The statement does not show the number of cars. It only shows the tonnage.

Q. Well, I meant to ask how many tons?

A. From Sims there were forwarded 2,736 tons, and from New Salem 169 tons. That is for the fiscal year ending June 30th, 1908.

Q. Were those two stations left out of this detailed account because of their unimportance?

A. Yes, sir.

Q. This statement of cars from Lehigh and Bismarck to various stations is correct to the best of your knowledge and belief?

A. Yes, sir, it is.

Q. And was made under your direction?

A. Yes, sir.

Mr. Bunn: It is offered in evidence, and we will have it marked "Defendant's Exhibit A."

Q. You may state briefly what this statement shows?

A. The statement shows the number of carloads forwarded from Lehigh and from Bismarck to all other points on the Northern Pacific line.

Q. In North Dakota or out?

A. In North Dakota, and I believe a few cars out of North Dakota, yes, sir.

Q. And what was the total number of cars from Lehigh?

A. 1,223 cars.

Q. And from Bismarck?

A. 1,046 cars.

Q. This statement covers the whole of the fiscal year ending the 30th of last June?

A. Yes, sir.

Q. (Showing witness another paper). Have you had prepared another statement, now shown you, showing tons, ton miles, the revenue, the average haul and the average rate per ton per mile, and the average reevenue per car on the lignite shipments referred to, for the year ending June 30th, 1908?

A. Yes, sir. Such a statement was prepared under the direction of our auditor of freight receipts.

Q. He worked under your direction?

A. He worked under my direction, yes, sir.

Mr. Bunn: That statement may be marked "Defendant's Exhibit B."

Q. This statement is true to the best of your knowledge and belief, is it?

A. Yes, sir.

Q. And the men who made this, and the books and documents from which it was made are also in the Northern Pacific building, and subject to examination and call by the Attorney General, if he so desires?

A. Yes, sir, all the documents are obtainable here.

Q. You may state briefly what that statement shows?

A. This exhibit shows the number of tons of lignite coal forwarded from Lehigh, Sims and New Salem, with the number of tons, ton miles, the Northern Pacific revenue, the average haul, the
54 average rate per ton mile, and the average revenue per car. The total number of tons moved was 64,257; the tons one mile is 5,590,993; the Northern Pacific revenue was $49,348.88; the average haul of the business was 87.01 miles; the average rate per ton per mile received was 8 mills and .83, and the average revenue per car, $20.81.

Mr. BUNN: This statement, Exhibit B, is offered in evidence.

Q. A further statement is shown the witness which we will have marked "Defendant's Exhibit C." This statement before you, Defendant's Exhibit C, was prepared as I understand by yourself?

A. Yes, sir.

Q. And contains some calculations and views of your own in regard to the reasonableness of the proposed North Dakota lignite rates?

A. Yes, sir.

Q. Using that statement will you please give your views and conclusions respecting these rates?

A. In view of the fact that it is not practicable to arrive at the actual cost of hauling a ton of any specific class of freight, we are obliged to fall back on the general results, and then take those results and apply them to the business under discussion. I did that in this case, taking the report which I will call the Swan report to the railroad commission of North Dakota for the fiscal year ending June 30th, 1908, and as shown by the exhibit, drew off the gross earnings, operating expenses and other factors for last year. The report shows that the ratio of operating expenses to earnings was 58.414 per cent of the gross earnings——

Mr. MCCUE: Now, we object to this line of testimony on the ground that it is a mere conclusion and opinion of the witness, and that the conclusions which he is attempting to testify to were not derived from the business of carrying lignite coal, or coal in the State of North Dakota, and as incompetent. Besides, the witness has already shown himself not qualified to testify.

The WITNESS (continuing): ——in the State of North Dakota the average distance of the freight carried in the state was 222.14 miles.

Q. That is, all freight?

A. All freight, and that the average rate per ton per mile received was 8.652 mills.

Q. When you say "all freight," as I understand that expression, you mean that these statements are based on all the freight local to North Dakota, and the mileage proportion of all the interstate freight?

A. Yes, sir.

Q. Moving into, or through, or out of the state, between that state and the other states?

55 A. Yes, sir. The exhibit shows that the average distance that lignite coal was carried during the same period was 87 miles, and that the average rate per ton per mile received was 8.83 mills; and that the average revenue per car was $20.81; that applying the proposed reductions in these rates, the average rate per ton per mile would have been 6.49 mills, and the average earnings per carload would have been $15.52. Also that the average earnings per car per mile would have been $17.84. Previous investigations that I have made along the same lines resulted in showing that applying the operating ratio for all business to freight business would not be very far out of line.

Q. I will ask you, Mr. Johnson, if it is part of your regular occupation, and has been for years, to figure on problems of this sort?

A. It is, yes, sir.

Q. You have done a great deal of it?

A. Yes, sir.

Q. Now explain so that the court will understand and these gentlemen will understand what you mean by the arbitrary bases for dividing expenses in both classes of business?

A. It is the practice of the Northern Pacific, for the purpose of checking up superintendents and keeping general track of the business, to divide expenditures common to both freight and passenger business on certain arbitrary bases.

Q. That is the practice of all the railway companies, isn't it?

A. It may not be the practice of all railway companies, but it is the practice of quite a number of the important lines.

Q. Well, it is necessarily the practice where you report to a commission separately on earnings and expenses of passenger and freight business separated from each other?

A. It is a fact, however, that none of the railway commissioners have asked for such information.

Q. What are, in a general way, the expenses common to both freight and passenger business, and what are the arbitrary bases?

A. Well, for example, an agent at a station may be handling both freight and passenger business, it would be impracticable to tell exactly just how much of that man's pay should be charged to one class, and how much to another class of business. Consequently we apply the train mileage basis to it.

Q. That is, you divide his pay according to the train miles of freight compared with the train miles of passenger?

A. Yes, sir. Another example: The maintenance of station buildings, that would be put on the same basis exactly, because we cannot tell how much of that maintenance was exactly due to the freight business and how much due to the passenger business.

56 Q. And as to the expense of the general officers and their salaries, and the general administration, is that divided in the same way?

A. Yes, sir.

Q. How about the repairs of tracks?

A. Exactly the same way—no, excuse me. Repairs of tracks would be divided ultimately on a train mileage basis.

Q. And repairs of equipment, I suppose, are charged to the freight or passenger business as the equipment is used in either?

A. Yes, sir. Repairs of freight cars would be charged to freight expenses, and repairs of passenger cars to passenger expenses.

Q. Then, when you say in your exhibit here that investigation has determined that the result would only vary a fraction from that arrived at by the use of the arbitrary bases for dividing expenses common to both classes of business, can you tell us a little more clearly exactly what you mean by that?

A. That the result of a division of all operating expenses on a gross earnings basis would be to all intents and purposes the same as we would arrive at by the use of these arbitrary bases.

Q. Train mileage basis, etc.?

A. Train mileage basis, car mileage basis, etc.

Q. You have taken in this statement the division according to the gross earnings?

A. Yes, sir.

Q. And you say the result would not differ materially from the other basis?

A. Yes, sir.

Q. The other basis I think I see, Mr. Johnson, would be very much more complicated, and involve much more computation?

A. Yes, sir, a great deal more.

Q. You may go on and resume telling us what your conclusions are?

A. Applying what may be termed the gross earnings basis, that is to say, assuming that the ratio of cost for handling the freight business and passenger business are the same, this conclusion is reached: the average rate per ton per mile received on business in the State of North Dakota was 8.632 mills; the operating expenses, that is to say, the ratio of operating expenses to all gross earnings in the State of North Dakota, was 58.414 per cent; applying this percentage to the rate received we produce an average cost per ton per mile of 5.054 mills.

Q. That, if I understand you, Mr. Johnson, is the average cost of moving all freight moved in North Dakota during that year?

A. Yes, sir.

Q. And is that as nearly an accurate computation of that average cost as you know how to make?

A. It is, yes, sir.

57 Q. Go on?

A. The average cost of 5.054 mills per ton per mile, as previously stated, covers all freight handled in the State of North Dakota during the previous fiscal year, and covers an average haul of 222 miles, or two and one-half times the average haul of the lignite coal business. Furthermore, it includes business passing through North Dakota, hauled as high as 2,000 miles, and I refer particularly to the transcontinental freight, in connection with which there is little or no terminal service required in the State of North Dakota. Exhibit A shows that the lignite coal business was distributed to 108 different points on the main line and branches of the

Northern Pacific. The average haul of 87 miles, being less than the length of any one main line operating district in the state, it necessarily follows that the lignite coal should be classified as what is known as way freight and branch line train business.

Q. You mean by that that in point of fact it must have been carried in way freight trains?

A. Yes, sir.

Q. Go on?

A. From investigation I have found that main line way freights and branch line freight and mixed trains carry only one-third of the tonnage that is carried in main line through freight trains, and that the main line through freight trains carry two and one-half times as much gross tonnage. I believe, therefore, that it is fair to assume that the cost of conducting transportation in connection with this short haul lignite coal business, is at least two and one-half times that of the average for all business.

Q. Now, why do you say that it is fair to assume that?

A. On the ground that it costs about as much per train mile for a way freight or branch line train as it does for a through freight.

Q. And the one train carries two and a half times as much load in North Dakota as the other?

A. Yes, sir.

Q. Now, what records of the company did you refer to to show that these trains carried two and a half times as much load as the other kind?

A. That information was derived from what are known as train manifests, such manifests beings reports of conductors to me showing the number of cars they have in their train, and the tonnage in each car.

Q. Those train manifests are part of the regular records kept by the company?

A. Yes, sir.

Q. They are in existence and can be examined by the Attorney General and his associates if they desire?

A. I believe they are, yes, sir.

Q. Continue?

A. As previously stated, and as explained here before, the average cost per ton per mile for all freight hauled in North Dakota was 5.054 mills, and this included 2.236 mills for conducting transportation.

58 Q. Stop right there a moment. What are the general items of operating expenses; the main divisions?

A. Operating expenses are divided under five general heads, namely, maintenance of way and structures, maintenance of equipment, traffic expenses, transportation expenses and general expenses.

Q. What are the transportation expenses?

A. Transportation expenses represent items that are directly connected with the movement of freight, including handling at terminals.

Q. Wages of train crews and fuel burned upon trains?

A. Yes, sir.

Q. In other words, that is the item or division of operating expenses which includes the actual cost of moving the trains?

A. Yes, sir, the cost from the time the freight is delivered to the consignee.

Q. Without including any general expenses of the company, without including the cost of repairing and maintaining its fixed properties, or repairing and maintaining its cars, or what you call traffic expenses?

A. Yes, sir.

Q. You may go on?

A. Based on the previous investigation as to the average load carried by way freight trains and branch line trains, to this cost of 5.054 mills I have added 150 per cent of the cost of conducting transportation, or 3.354 mills.

Q. Now, if I understand you, the reason you say it is fair to add that is that the loading of through freight trains is two and a half times as heavy as way freight and branch line trains in North Dakota?

A. Yes, sir.

Q. You may go on?

A. This produces a total cost per ton per mile of 8.408 mills.

Q. And that is a statement of the total cost per ton per mile on what?

A. Lignite coal in North Daktoa.

Q. The hauling of lignite coal in North Dakota?

A. Yes, sir. At the rates proposed by the state for this lignite coal, the Northern Pacific Railway Company would have received per ton per mile 6.490 mills; so that the company would be losing on each ton of lignite coal 1.918 mills, or about 29½ per cent of the revenue. Exhibit B shows that for this lignite coal business in the fiscal year ending June 30th, 1908, the company received an average rate per ton per mile of 8.83 mills. The cost of hauling this lignite coal, as just previously explained and stated, is 8.41 mills; therefore, the business at the old rates, or present rates, yielded a profit of .42 of a mill per ton per mile, or approximately 5 per cent of the earnings.

59 Q. And no provision is made in these figures for taxes or other fixed charges of the company, nor interest on the capital investment, nor dividends on the stock, or anything of that sort?

A. No, sir. It is the amount of money——

Q. You have based your computations, in other words, on the actual cost of moving this business?

A. As near as I could get at it, yes, sir.

Q. Define what your statement means by the terms "gross tonnage," and the term "net tonnage," or "paying tonnage?"

A. The term "gross tonnage" means the paying load plus the weight of the equipment hauled in which the paying load is carried.

Q. And the term "net" or "paying tonnage" means what?

A. That refers to the tonnage upon which the company receives revenue.

Cross-examination.

By Mr. McCue:

Q. In this Exhibit A you have taken the shipments from Lehigh and from Bismarck as your only basis of figuring as to the number of cars of coal shipped in North Dakota?

A. Yes, sir.

Q. You have not included in that schedule Exhibit A any carloads of coal other than lignite coal?

A. No, sir.

Q. Do you know whether or not there is other coal shipped over the lines of the Northern Pacific in North Dakota than lignite coal?

A. I assume that eastern coal is hauled from the head of the lakes to North Dakota.

Q. Do you not also know that there is coal hauled to points in North Dakota and then redistributed to other points in the state?

A. I was not aware of that specifically.

Q. Your line of road, that is, the Northern Pacific road, receives coal at many other points in the State of North Dakota other than at Lehigh and Bismarck?

A. I assume that we do receive coal at other points.

Q. In Exhibit B you have included, as far as the question of coal rates is concerned, only the shipment of lignite coal in North Dakota?

A. Yes, sir.

Q. And you have not included in that schedule marked Exhibit B, when it refers to coal, any figures pertaining to the shipment of bituminous or anthracite coal in the State of North Dakota?

A. No, sir.

Q. Are your estimates as to the cost of transporting coal in the State of North Dakota based upon the figures which you have set forth in Exhibit A?

A. No, sir. They are based on the figures shown in Exhibit B, and also in connection with Exhibit A as far as regards the
60 general distribution of the shipments, that is to say, that the shipments are scattered to all points on the lines in North Dakota, including the branch lines, and that the business is not carried in large quantities on any one day and between the same points.

Q. Have you set out anywhere the schedule of the number of cars, or the tonnage of all coal transported from one point to another point within the State of North Dakota?

A. Not of *all* coal, no, sir.

Q. Then you do not know what the correct cost of the transportation of all coal within the State of North Dakota is?

A. I do not know the exact cost, but providing conditions were exactly similar, it is my opinion that the cost of handling all coal would not differ materially from the cost of hauling lignite coal.

Mr. McCue: Now, we move to exclude the latter part of the answer as not being responsive, wherein the witness attempts to make a comparison.

Q. Have you any other schedule than Exhibit A which shows the number of cars or the tonnage of lignite coal received at other points than those named in Exhibit A?

A. Exhibit A shows the number of cars of coal forwarded——

Mr. McCUE: No, we object to this answer, because it is not responsive.

Q. I want to find out, Mr. Johnson, simply what you are basing these matters on, so as to get at a starting point?

(The former question was read to the witness.)

A. I have not prepared any statement in the same form as Exhibit A, showing lignite shipments from New Salem and Sims, which, in addition to those from Lehigh and Bismarck, would constitute all the lignite coal business in North Dakota during the fiscal year ending June 30th, 1908, but Exhibit B shows the number of tons forwarded from these four points, with the ton mileage, the revenue, the average haul, the average rate per ton per mile, and the average revenue per car. To make the statement of all lignite coal business complete it would only be necessary to continue Exhibit A by the addition of shipments forwarded from Sims and New Salem.

Q. Then, if I get your idea, you have made up your total tonnage of lignite coal from that received at Lehigh, Bismarck, Sims and New Salem?

A. Yes, sir.

Q. And your conclusions which you have given in regard to the cost of transportation of lignite coal are based upon that fact?

A. Yes, sir.

Q. Don't you know that the Northern Pacific receives lignite coal, or takes it from the Soo line at Carrington, also at Rogers and other points where the Northern Pacific crosses
61 the Soo line in the State of North Dakota?

A. I was not aware of the fact that we exchanged business, that is, lignite coal business, with the Soo line except at Bismarck. As to this, however, I may be mistaken, and there may be some shipments exchanged at the two junctions that you refer to.

Q. And other junctions also in the state?

A. As to that I cannot say. I will say, however, that in requesting the information to be used in this case from our auditor of freight receipts, I directed him to give me a complete statement of all lignite coal handled by the Northern Pacific Railway Company in North Dakota.

Mr. BUNN: During last year?

—. During the year ending June 30, 1908.

Q. You know, however, that he has given you a full report?

A. I can only assume that he complied with my orders.

Q. And your statements are based upon that assumption?

A. Yes, sir.

Q. When you figured that the main lines carried two and one-half times as much freight as the branch lines and way freight

trains, you base that upon the deductions which you have made from Exhibit A and Exhibit B?

A. No, sir. That information was derived, as previously stated by me, from what are known as train manifests, and not from the statements marked Exhibits A and B.

Q. These branch lines all form a part of your main line, do they not?

A. No, sir.

Q. They all intersect with your main line?

A. They connect with the main line.

Q. And when freight is received at points on the branch lines it may be shipped over a portion of the main line?

A. Yes, sir, it may.

Q. And a great deal of it is so shipped?

A. What particular freight do you refer to?

Q. All freight?

A. All freight; yes, sir, that is true.

Q. The coal which is forwarded from Bismarck is forwarded by your main line?

A. Practically on the main line.

Q. Yes?

A. Yes, it may be partially over the main line, partially over the branch lines. Depends on the destination.

Q. The coal that is forwarded or which you receive at New Salem is shipped over the main line?

A. Partially, yes, sir. Depends in that case also on the destination of the coal.

Q. But in order for it to go anywhere from New Salem, it has got to go a distance at least over the main line?

A. It has, yes, sir.

Q. So that you cannot give an intelligent or rather a correct deduction based upon a comparison of the tonnage that is hauled over the main line and over the branch lines?

62

A. I don't quite understand your question; that is, the drift of the question. In speaking of comparisons do you refer to the comparative cost?

Q. Yes.

A. Or to the comparative density of business?

Q. The comparative cost is what we are trying to get at now?

A. We know that it costs a great deal more to haul freight on the branch lines than it does on the main line, on an average.

Q. And that conclusion is arrived at from the fact that you receive less freight on a branch line than is transported on a main line?

A. Yes, sir, the density is very much less.

Q. And that factor is the sole reason for the difference in the cost of transporting freight on branch lines?

A. That is a very important factor.

Q. (Showing witness Exhibit C.) Now taking Exhibit C. You have stated that the average rate per ton per mile was 8.85 mills?

A. Yes, sir, that was the average rate per ton per mile received for the lignite business, as demonstrated by Exhibit B.

Q. And Exhibit B only included those four points?

A. Only four points, yes, sir.

Q. Which we have heretofore referred to, namely, Bismarck, Lehigh, New Salem and Sims?

A. Yes, sir.

Q. And was that conclusion arrived at from the fact which you have stated with reference to the difference in amount of tonnage transported over the main line from that of the branch line?

A. No, sir. That average rate of 8.83 mills is arrived at by taking the revenue that the company received on the lignite coal as shown by Exhibit B, divided by the number of tons of lignite coal carried one mile, also shown in Exhibit B.

Q. And in that computation you did not take into consideration the shipment of bituminous or anthracite coal in the State of North Dakota, nor the lignite coal forwarded by your company from other points than those points named?

A. No, sir.

Redirect examination.

By Mr. BUNN:

Q. Mr. Johnson, if lignite is received by the Northern Pacific at Soo junction points and distributed through North Dakota, would the expense and conditions of that transportation differ from those that you have spoken of, namely, Bismarck and Lehigh?

Mr. MCCUE: To that question I object as calling for a conclusion of the witness which the witness has already shown that he is
63 incompetent to draw or testify to, and from the further fact that the witness has testified that the cost of transportation is based on the quantity of freight received.

A. If there were more branch line haul in connection with those shipments than on the shipments shown in Exhibit B, it would cost the Northern Pacific Railway Company more to transport that coal: that lignite.

Q. Well, how is that at the Soo junction points?

A. As far as I know, exclusive of Bismarck, the Soo line junction points are Carrington and Rogers, both points being located on branch lines of the Northern Pacific.

Q. Are you able to say, assuming that there is any lignite received at Carrington and Rogers from the Soo, whether or not the amount is at all considerable or important?

A. I believe it to be inconsiderable and unimportant.

Q. Assuming that sometimes bituminous or anthracite might be moved within the state of North Dakota from Fargo, or Jamestown, or Valley City, or any local point in the state, to another local point in the state, would the expenses and condition of that movement differ materially from those of lignite?

Mr. MCCUE: The same objection as last above named.

A. No, sir.

Q. I think, Mr. Johnson, that the attorney general misapprehends you entirely, and that perhaps you have not seen that, in this

respect; where you compared in your Exhibit C the tonnage on way freight and branch line trains with the tonnage on main line trains, the attorney general seems to suppose that you are comparing density of traffic on branches and main lines; now how is that?

A. The question of density of traffic on branch lines as compared with the main line is not considered in this proposition at all. It is a question of train load on main line freight trains as compared with way freights and branch line trains.

Q. That is, through freights are contrasted with way freights and branch line trains?

A. Yes, sir.

Q. Your branch line trains are way freights?

A. Yes, sir.

Q. And there is no contrast drawn in your statement between the tonnage on branch lines and the tonnage on main lines?

A. No, sir, not as to density of traffic.

Q. The point that you make, as I understand you, is that the 87 mile haul on this coal shows that it can not be transported in through freight trains?

A. As a general proposition, No. Eighty-seven miles is a
64 shorter distance than any main line operating division of this company, the Northern Pacific, in the state of North Dakota.

Q. And as I understand you, you say that therefore this coal must be carried in way freights, and that you have found that the way freight in North Dakota carries about one-third of the load of what you call a through freight?

A. Yes, sir, one-third of the paying load.

Q. Now, just define, so that the Court will understand what you mean by a "through" freight.

A. By a "through" freight I mean freight that may be picked up at one operating division terminal, put into a train and carried to the next terminal.

Q. Necessitating no intermediate switching or additional expense of that character, and no intermediate loading and unloading?

A. No station service.

Q. What you call a through freight train in your Exhibit C, is a train that runs from one operating division to another, and actually runs on the Northern Pacific road in North Dakota loaded to its capacity.

A. Yes, sir.

Q. Is it possible to load to their capacity way freight trains and branch line freight trains in the state of North Dakota?

A. No, sir, not in my judgment.

Q. The statement you have given in that respect is based on the actual loads handled by the Northern Pacific Company in that state, as shown by the train manifests?

A. Yes, sir.

Recross-examination.

By Mr. McCUE:

Q. You would call through freight then, Mr. Johnson, a train load that was run from Fargo to Jamestown?

A. Yes, sir, that would be a through train.

Q. And through freight would be all business transported from one freight division point to another?

A. Yes, sir, without interruption.

Q. Now you have stated that the cost of transporting freight over branch lines is higher per ton than the cost of transporting the same freight over the main line?

Mr. BUNN: No, he hasn't made any such statement. You misapprehend him entirely. You will search his testimony in vain for any such statement, or any statement on that subject.

Mr. McCUE: Well, if he has not, let him say so. That is the conclusion I have gathered.

Mr. BUNN: I thought you misunderstood him.

The Witness: I don't recall having made any such statement as that.

65 Q. Well, you have stated that the quantity of freight transported over the main line, or what you call through freight, is two and a half times the amount of the freight that is handled over the branches and way freights?

A. Yes, sir.

Q. In making up your conclusion as to the cost of transporting freight, you have taken into consideration the quantity that is received and transported?

A. I don't quite get the gist of that question.

(The question was read by the stenographer).

A. No, sir. I have considered only whether the freight can be moved in main line through freight trains, or whether it is necessary to handle it in main line way freight trains, or branch line way freight trains.

Q. If a branch train could carry the same quantity of freight as a through freight train upon the main line, there would be no difference in the cost of transportation?

A. Providing that the density was as great on the branch line as on the main line, there should be very little difference in the cost.

Q. And by "density" you mean quantity?

A. Quantity of freight, yes, sir.

Q. Well, now, we are not very far apart. Then your reason for stating that it costs more to transport freight over branch lines and by way of way freights than it does through freight, is based upon that conclusion?

A. Yes, sir.

Redirect examination.

By Mr. BUNN:

Q. Now, Mr. Johnson, is that statement based on any consideration of the density of the traffic on the two lines?

A. As regards the transportation expense, providing the load in a through freight and a way freight were equivalent, the difference in cost would be against the way freight.

Q. Well, isn't your statement, your Exhibit C, based entirely on the difference in tonnage between two kinds of trains and not in any respect on the difference in density in traffic on the two lines?

A. It is based entirely on the train load.

Q. The difference in tonnage carried by two different kinds of trains?

A. Yes, sir.

Q. And not in any respect, is it, Mr. Johnson, on any consideration of the density of traffic on one line of road or another?

A. Not as regards transportation expenses.

HOWARD ELLIOTT, a witness produced on behalf of the defendants after being first duly sworn, testified as follows, in answer to questions by Mr. BUNN:

Q. Mr. Elliott, you are president of the Northern Pacific Railway Company?

A. Yes, sir.

66 Q. And have been for how long?

A. A trifle over five years.

Q. State in a brief way the general nature of your railroad experience?

A. I was educated as a civil engineer at the Lawrence Scientific School of Harvard University, and did some work along the lines of my profession in 1880 and 1881. After that I entered the accounting and treasury department of some subordinate lines of the C. B. & Q., serving in a clerical capacity, and then as auditor and assistant treasurer of those subordinate lines until about 1887. I then was made general freight and passenger agent of the same roads, about five hundred miles of railroad, having charge of both classes of business from 1887 to 1891. At that time some other roads were put in under the jurisdiction of the office where I was, and I gave up the passenger business and took charge of the freight business for approximately a thousand miles of road, mostly in the state of Missouri, and of the freight business that we might obtain from the territory south of Kansas City and St. Louis. I served in that capacity until 1896, when I was made general manager of the same properties, having jurisdiction over all departments.

Q. Those properties lay in what state, Mr. Elliott?

A. Mostly in Missouri. A little in Iowa, and a few pieces in Kansas and Nebraska, but chiefly in the state of Missouri. In 1902 I was made second vice-president of the C. B. & Q. Railway Company, having general charge of the maintenance and operation of

all the properties owned and controlled by that company. I served in that capacity until October 31st, 1903, when I was elected president of the Northern Pacific Railway Company.

Q. Your experience in the actual operation of railways extends over fifteen years then, as I gather from your statement.

A. Why, yes, sir, I should say that is a correct statement.

Q. In the state of Missouri, Iowa, Kansas and Illinois, and the states that the Northern Pacific runs through, besides some other states?

A. That is correct.

Q. How does the coal business in its direct, actual transportation by railway compare in North Dakota and Iowa and Illinois?

A. Well, the transportation of coal in Iowa and Illinois is on a very much larger scale than it is in the state of North Dakota. The coal in Iowa and Illinois moves to a much larger extent in large blocks, in either train loads or in a good many cars in a given train. The mining industry in both Iowa and Illinois and Missouri is an important part of the industry of those states.

67 Q. What do you say about the same business in North Dakota?

A. The mining business in North Dakota is not an important part of the total business of the people of that state. The movement of coal there is relatively smaller, and the production of coal is very much less than the production of agricultural products.

Q. This Exhibit A that Mr. Johnson has prepared, shows the coal moved on the Northern Pacific from Lehigh and Bismarck, in the last fiscal year, was moved to 108 different stations, and as you might say a car at a time; what figure does that cut in the expense of operation as compared with moving coal in train loads, or a large number of cars at a time?

(Showing witness Exhibit A.)

A. This statement shows that in very few cases have there been more than a few cars going to any one place within the twelve months' period, and in some cases it is shown that there has been a much larger number moved with the twelve months' period. But even in that case, if you divide the larger movement by the number of days in which coal would be apt to move, it means that the coal is moved from some given originating point to destination not more than one or two cars at a given time and in a given train. Under these conditions the handling of those cars of coal is manifestly more expensive to the carrier than if they moved them all in a block, or in a few trains.

Q. Have you read Mr. Johnson's Exhibits A, B and C, the three papers that he testified concerning this morning, and did you hear his testimony?

(Showing witness the Exhibits referred to.)

A. Yes, sir, I have read Exhibits A, B and C, and I heard a portion of Mr. Johnson's testimony. I don't know how long he had been on the stand when I came into the room.

Q. From your experience as an operating man, and your knowledge of the loading of Northern Pacific through freight trains compared with way trains, can you give an opinion as to how much more it costs to move way freight than it does through freight?

A. I don't know that I could testify to the actual percentage of increase of cost, but moving way freight as compared with through freight, taking into consideration all of the elements that go to make up cost, in my judgment——

Q. I meant to confine my question to transportation cost, Mr. Elliott.

A. I understand. Taking all the elements into consideration I should say it costs at least twice as much for the conduct of way freight on the main line and the branch line business, as compared with some of your main line through freight business.
68 In other cases that it costs three and four and perhaps even five times as much as your main line through freight business.

Q. I would like you to speak of it particularly with reference to the fact testified to by Mr. Johnson that the way freights and branch line freights are loaded one-third as heavy on the average as the through freights on the average?

A. My judgment as to that, without having tabulated personally the figures, but simply forming my opinion on my study of the operation of the road day by day and month by month, would be that our way freights as a whole were not loaded with one-third of the tonnage of the main line through freights. I think Mr. Johnson's estimate, as it seems to me, was fairer to the way freight than to the through freight.

Q. I should like you to assume, Mr. Elliott, that in North Dakota during the last year the way freights were loaded one-third as heavy as the through freights, and tell us what influence on cost that has?

A. Well, assuming that your way freight has only one third of the tonnage of the main line through freights, the relative cost would be increased, in certain of your items, from one to three times over the main line through freight.

Q. Well, you say "certain of the items." Now by that expression "certain of the items," do you mean the actual cost of transportation?

A. I mean the actual amount that you would pay out for performing the service in hauling your lignite coal, or other article, on the branch line, would be two to three times more than it would be on the main line.

Q. In other words, the mere cost of transportation?

A. Yes.

Q. You have been studying the traffic of the Northern Pacific Road for the past five years?

A. Yes, sir.

Q. Mr. Johnson found that the average haul of this North Dakota lignite was 87 miles; tell us whether that fact shows that it is hauled in way freight trains, and must be from an operating standpoint?

A. Why, that fact in itself of necessity shows that the railroad

in the effort to handle all of its business would put the lignite coal on a way freight and not on a through freight, because if they put it on a through freight they would have to stop it at an intermediate point, which would tend to reduce the efficiency of the road; and for that reason you put it on a train that drops the cars at intermediate stations between one terminal and the next terminal.

Q. If you did that, that would mean that your through freight would not be fully loaded; could not be, could it?

A. It could not. We could have our through freight
69 loaded only for a short distance on the run that it started out to make from the terminal.

Q. Now, these rates that the legislature prescribe would produce on our lignite traffic 6.490 mills per ton mile; in your opinion as an operating man would that revenue pay the actual cost of moving the traffic?

Mr. McCUE: That is objected to as a mere conclusion of the witness, calling for his opinion without basing it on actual results, incompetent, and it is also calling for a judicial determination of the question at issue.

A. Why, in my opinion, the rates named there, six and some thousandths mills—I didn't catch it all—would be considerably below the cost of transporting our business in North Dakota and very much below what I believe is the average cost on the branch lines of North Dakota.

—. Well, my question is, Mr. Elliott, whether in your opinion it would pay the actual cost of moving this particular lignite?

A. I don't believe it would.

Q. Tell us, Mr. Elliott, if there is any difference, any material difference in the expenses of transportation or in the cost of it to the carrier of any other kind of coal picked up locally in North Dakota and moved from one place to another in a small way, and this lignite movement that we have been talking about?

A. No substantial difference.

Q. If you receive a few cars of coal from the Soo road at Carrington, or some other junction point, would the conditions of that transportation be the same as that you have been testifying about?

A. Substantially the same.

Q. Your views would not be altered in the least if you found that some coal was moved locally,—some bituminous coal was moved locally in North Dakota, and some little coal received from the Soo at Carrington or other junction points?

A. No, sir, my views would be just the same.

Cross-examination.

By Mr. McCUE:

Q. You are acquainted with the general topography of the state of North Dakota, are you, Mr. Elliott?

A. Reasonably well, yes, sir.

Q. That is you have been over all your lines in North Dakota?

A. Yes, sir.

Q. A number of times?

A. Yes, sir.

Q. And is it true that North Dakota is a prairie country, and where your lines of road run generally there are few grades of importance?

70 A. I could not answer that question in the affirmative, because your views and mine differ as to what are "grades of importance." We have grades of many different kinds in North Dakota, both on the main line and on the branches. We have on some of our main line a grade of 52.8 feet to the mile, which, in these days, we consider a very high grade. We have on some of our branches a grade equally as large.

Q. That grade that you speak of is at Valley City, is it not?

A. No. That one per cent grade exists in a number of places between Mandan, North Dakota, and the state line near Beach, in the western part of the state, and we have grades a little worse than one per cent in and out of Jamestown, and grades a little worse than one per cent in and out of Valley City.

Q. But generally speaking where your road runs in North Dakota runs over prairie country where there was very little excavation necessary to lay your tracks?

A. I could not assent to that. There have been some very heavy cuts and fills in a great many places in North Dakota, even to obtain the present grades.

Q. The fills and cuts that exist along your lines are very short as compared with general lines; isn't that true?

A. No, I don't think it is. We have a good deal of steady cut and fill. Some of them are not very big. I should say that our railroad as a whole was not laid right on the surface of the ground in North Dakota. We had to cut and fill nearly everywhere.

Q. Are you acquainted with the topography of the country down in the coal fields in the state of Illinois?

A. Part of it, yes, sir.

Q. Been over a good deal of that, have you, Mr. Elliott?

A. I have been over all the C. B. & Q. lines in Illinois, and some of the Illinois Central and some of the Chicago and Alton.

Q. Down through that country the land is low in many places, is it not?

A. Yes, sir.

Q. And the railroads were compelled to construct a lot of trestle work?

A. Not a lot. Some. The C. B. & Q. line that goes down into their coal fields, some of it is quite heavy.

Q. Trestle work?

A. Not trestle work, but heavy grades. Other parts of it runs through a more or less level country, and much more level than the average of North Dakota country.

Q. The coal that was obtained in Missouri while you were in the employ of the C. B. & Q. was obtained down in the Ozark country, was it?

A. No, sir, it was obtained on the line of the old Hannibal & St

Joe road, between Hannibal and Brookfield, Missouri, and 45
71 miles west of Hannibal and St. Joe, Missouri. We also received considerable coal that was mined south of Kansas City, on roads other than our own.

Q. Are you acquainted with the lines of road that run along the Mississippi river across the state of Iowa north and south?

A. I am very familiar with the line that runs from St. Louis to Burlington, Iowa, and reasonably familiar with the line that runs from East St. Louis through Illinois, but not along the river. It runs north and south up to Beardstown and Galesburg, and then up to Savannah, where it connects with the C. B. & Q. line to St. Paul.

Q. It is more expensive, is it not, to build railways in that country than it is in the state of North Dakota?

A. In Illinois?

Q. And also in Iowa, along the Mississippi river?

A. I should doubt if it was any more expensive. I should say it was not. There is some very heavy work on the C. B. & Q. line between East St. Louis and Savannah, Illinois.

Q. There is heavy work you say?

A. Yes.

Q. Then it would cost more to construct railways there than it would in the state of North Dakota?

A. There is some heavy work in North Dakota also.

Q. But comparing the two, I want you to tell me, which would be more expensive to construct, the same character of a road through North Dakota generally, or through that part of Illinois and Iowa?

A. Well, to get a railroad from East St. Louis to Savannah, or from St. Louis to Burlington, a main line road, compared with the main line road from Fargo to Beach, North Dakota, with equal grades on each road, I believe the North Dakota road would cost the most.

Q. But you would not say that the grades or the excavations were so much in North Dakota as though the territory we have just referred to in Iowa and Illinois, would you?

A. Well, I was trying to illustrate. Take it all the way through, there are parts of that road from St. Louis where the excavation is less, just as there are parts in North Dakota where the excavation is less, and there are other parts where it is heavy, just as heavy, that is for us to get a low grade line all the way across the state of North Dakota, such as we have got from St. Louis to Burlington, Iowa, on the west side of the river, or from East St. Louis to Savannah, Illinois, on the east side of the river, and not along the river,—to get as low a grade, as either of those roads, across the state of North Dakota, would, in my judgment, require more work than we had to
put on the same road in those two places. To get a low grade
72 across North Dakota from Mandan to Beach is a very difficult thing to do. I don't know that it can be done.

Q. The reason why you say, Mr. Elliott, that the coal business in the state of North Dakota is not an important business is based upon the amount of business that the Northern Pacific handles in the line of coal shipments?

A. I meant important in the sense of its relation to the other business handled. It is an important business that you must have fuel for the people and keep them warm, and for such industries as you may have.

Q. The people of North Dakota burn as much coal as they do in the states of Iowa and Illinois, don't they, in a given period?

A. Well, the individual family I presume burns as much, and probably more. The people of North Dakota as a whole, I imagine, burn very much less than the people of Iowa or the people of Missouri.

Q. You are taking into consideration now the difference in population?

A. Yes.

Q. In making that statement, Mr. Elliott, you have not taken into consideration the quantity of coal that exists in the state of North Dakota?

A. Yes, I have. I should say that the people of North Dakota per family would burn more coal probably than a given family in Missouri, or a given family in Illinois, but there are many more people in the last named states, and taken in the aggregate they would burn very much more coal.

Q. But you stated in your direct examination that the transportation of coal in the states of Iowa, Illinois and Missouri was a very important part of the business?

A. Yes, sir.

Q. And that the transportation of coal in the state of North Dakota was not of much importance?

A. Yes.

Q. Now I ask you to state if that conclusion is not based upon the fact of the small amount of lignite coal which your company has handled since you have been its president?

A. Well, it is naturally based in part upon the fact that in looking over the sources of tonnage that we have we find that the lignite coal is not an important part of the aggregate tonnage moved.

Q. And it is from the tonnage moved that you draw or deduct that conclusion?

A. Yes, sir, the total volume of business that the railroad handles.

Q. You have no knowledge or information as to the amount of coal deposit that exists in the state of North Dakota?

A. Well, I have this general knowledge and information, that it is generally acknowledged that there is a larger amount of
73 lignite underlying a great many acres of land in certain parts of North Dakota.

Q. You also know then from that knowledge that this business has not been developed to any great extent there at this time?

A. Not developed very largely, no, sir.

Q. Now, Mr. Elliott, don't you think that if the people of North Dakota had a reasonably low rate for the transportation of coal and lignite coal in the state, that it would tend to develop the industry in that state?

A. I firmly believe that a reduction of the present lignite rate

would have absolutely no effect on increasing the volume of the business.

Q. Have you got a general knowledge so as to tell me, Mr. Elliott, the cost of the transportation of coal from the head of the lakes, that is, Duluth, to Fargo, per ton?

A. I have no knowledge that would enable me to tell you the cost, the absolute cost of moving any given commodity between any two given points. I have a general knowledge of what we call average costs, and estimates of that average cost over different parts of the railroad, but I have no knowledge of the absolute cost of transporting coal from the head of the lakes to Moorhead or Fargo.

Q. Can you give me what the freight rate is from the head of the lakes to Fargo, on coal?

A. No, I cannot, Mr. McCue.

Mr. BUNN: I can give it to you, Mr. McCue, in five minutes, if you want it. It is in evidence here.

Mr. MCCUE: Well, I guess it is.

Q. You don't know, Mr. Elliott, the amount of lignite coal that is consumed in the State of North Dakota, as compared with the amount of bituminous and anthracite coal that is consumed there, do you?

A. No, sir, I have never made any calculations.

Q. Mr. Elliott, return to Exhibit C, I think it is; down at the bottom of the exhibit, on the second page, Mr. Johnson has drawn a conclusion from which he states that the profit is 42 mills per mile for the transportation of lignite coal; that is a profit under the present rate that is in force by the different companies, is it?

A. That is an estimate of what is left over from the present rate, after assuming to arrive at the cost of the method outlined by Mr. Johnson.

Q. Taking the item of 1.918 mills, which Mr. Johnson says would be the loss per ton per mile for the transportation of lignite coal, I wish to ask you if that conclusion is not based upon a comparison with the charges which you make for the transportation of freight in North Dakota?

74 A. That is based on taking the average of all of your freight in North Dakota, and arriving at the average cost in the manner outlined by Mr. Johnson, and then assuming that your lignite coal would carry its share of that average, plus these extra items, conducting transportation, and calling that the average cost of handling your lignite coal business. Taking that figure and comparing it with the average that we would receive under the rates proposed by the state, we have the figure given by you as a deficiency, 1.918 mills per ton per mile.

Q. Then that is a comparison based upon what is received from hauling freight different from lignite coal?

Mr. BUNN: There isn't a word in it about what is received for hauling freight.

A. Mr. McCue, I will try to make that clear. As I understand it, this figure, 8.408, has absolutely nothing to do with the revenue

that may be received by the company for transporting either lignite coal or any other class of freight. It is a figure arrived at by taking the number of tons of freight of all classes transported one mile in North Dakota, and dividing it into the total expense incurred for maintaining and operating your railroad in North Dakota, and thereby you get a certain figure of average cost. Then, there is added to that this estimate for extra cost on the way freight or the branch line, lifting the so-called average cost to a higher figure than if you simply charged up against the lignite coal only the average cost.

Q. Now, then, this average cost of transportation is made up from the total expenditures occasioned on account of traffic, of freight?

A. The total expenditures incurred in maintaining and operating your railroad in the State of North Dakota.

Q. Yes, and that itemized consists of the salaries of the train crew, the fuel that is used for your engine, the cost of water and maintenance of your employés at the stations and terminal points?

A. That, and also your expenses for maintenance of equipment, and some proportion of the indivisible expenses of other kinds, the administrative expenses, loss and damage accounts, and all the moneys you have paid out for any purpose in maintaining and operating your railroad.

Q. Now, then, the unseen expense, that is arrived at by simply making an estimate?

A. That is right. There is an arbitrary basis adopted.

Q. That is just a matter of arbitrary basis?

A. Yes.

Q. You can ascertain, though, the actual cost by figuring up what you have paid out for actual service. Now, then, I would like to ask you what is the average expense per mile actually in-
75 curred for the transportation of an average load of freight in North Dakota?

A. Taking the figures up on this same general basis that was explained by Mr. Johnson of making this arbitrary allotment of indivisible expenses, part to passenger and part to freight, the average freight train cost in North Dakota would be something over $2.00 a train mile.

Q. About how many cars of, we will say, seventy-ton capacity do you call an average train?

A. Well, we have no cars of seventy-ton capacity. On our main line, between Fargo or Dilworth, which is the new division point just east of Fargo, between Dilworth and Mandan our heaviest trains will perhaps weigh twenty-one tons gross, of which the loading in the cars might be one thousand tons; and west of Mandan, possibly 1,350 tons gross. That is the heaviest trains. Now, the way freights would be all the way from 250 tons to seven or eight hundred tons gross, depending on the amount of business to be handled along their main line by the local or pick-up freight, and depending on the amount of business that might be sent out on the branch and brought in from the branch.

Q. Then it would cost about $2.00 a mile to transport a trainload of freight that would weigh about a thousand tons?

A. I don't know. I say that is the average of the whole business.

Mr. BUNN: That is $2.00?

A. $2.00, yes.

Q. $2.00 per mile? Is that average made up of actual cost or in that estimate is also the invisible cost included?

A. The invisible costs are included in there, and subdivided on the basis that is used quite largely by the railroads for the purpose of arriving at an approximate figure for comparative purposes in checking up their own affairs. That basis is a train mile basis. Where it has been established that you run just as many passenger train miles as you do freight train miles, you would divide the cost of painting a station one-half to freight expense and one-half to passenger expense. That may or may not be right, but we use it simply as a measure to check up our own efficiency and economy. By using that theory, and segregating the expenses, my recollection is we would get at an average figure somewhere around $2.00.

Q. Then the cost of transportation, that is, your average cost of transportation, is arrived at through an arbitrary rule on account of divisions which you make between your freight and passenger traffic?

A. Yes, sir.

Q. And also on account of the invisible expenses that may be occasioned on account of the passenger traffic?

76 Mr. BUNN: I wish you would define what you mean by "invisible."

Mr. MCCUE: I don't care anything about that any more than what Mr. Elliott said.

Mr. BUNN: He said "indivisible."

Q. I mean the invisible. That is to say, you set aside a certain amount for traffic expenses in making up your profit and loss account, don't you?

A. Well, I would not put it that way, Mr. McCue. We keep as accurate account as we can of every class of expense, and show it on our books tabulated once each month, and there are something like 84 different items. Now, a certain number of those items you can with considerable exactness say was all on account of moving your freight as a whole; a certain number of items you can set apart as on account of moving all your passenger business as a whole. There are certain other items which we call "indivisible," and which you call "invisible," about which there is no possibility of stating exactly how much should be charged to a freight train mile, or how much should be charged to a passenger train mile, which, for the purpose of comparison, and for making up our account year after year in the same way, we, in common with a number of other railroads, have adopted the plan of dividing these indivisible or "invisible" items on the basis of the number of miles run by freight trains, and the number of miles run by the passenger trains. For example, taking it two years ago, how would you divide the expense

of bucking snow in Jamestown and Carrington between freight trains and passenger trains? You could not do it. No way of doing it. We simply divide it on the train mile basis. We charge up so much of the cost of clearing the road and getting it ready for business, to freight expenses, and so much to passenger expenses, based on the train miles that we run. Other people might divide it on some other basis.

Mr. KELLY: Would that be true where a station house, for instance, burned down and had to be rebuilt? That would be another indivisible expense?

A. Yes.

Mr. BUNN: Mr. Elliott's salary is one of them.

The WITNESS: Every expense other than what is a proper charge to the capital account of the road, goes into our operating expenses, and that is subdivided in this effort to get at the average cost in the manner I have outlined. Now, some people would divide it on another basis. Two or three different ways for doing it.

Q. I think I understand your proposition very thoroughly, Mr. Elliott, but what I was trying to arrive at was the accuracy
77 of your method for apportioning these different things, and if I gather from your statement it is not an accurate method, but it is an arbitrary rule adopted by your company?

A. That is correct. I never have claimed, and do not now claim, that I could go to work and tell you or anybody else what the absolute cost was of moving a given ton of freight a given distance.

Q. Some roads charge more to passenger traffic, or their passenger department, and other roads charge more to their freight department.

A. I don't know. I am not advised as to that. My impression is that those roads that segregate at all follow out this same basis that we do.

Q. That you do?

A. Yes, sir.

Q. So, then, it is almost impossible to arrive at a mathematical calculation as to the cost of transporting freight in the State of North Dakota, or any other state?

A. Any given article of freight.

Q. Any given article of freight?

A. That is right, yes, sir.

Q. All these figures which Mr. Johnson has prepared, as shown by these exhibits, are conclusions based upon the methods of the Northern Pacific, for apportioning the cost of the different items as compared with the railroad traffic?

A. Well, based upon this arbitrary division of your total expenses in the state.

Q. Now, what may be wrong from an actual expenditure for freight traffic? That is to say, more of the expense may have been charged to the freight department than should have been charged to it?

A. Well, that is something that I don't know. All I know is that is the way we have adopted for making a segregation of the expenses.

You might say that in making it up you would use some other basis. This is the basis we have adopted to try to arrive at these averages.

Q. And your testimony is that this arbitrary rule may be correct or it may not; you so stated?

A. Yes. You could divide it up on the basis of a number of tons of freight hauled one mile, and the number of passengers hauled one mile, and use that as your arbitrary rule, or you could charge up arbitrarily 75 per cent to freight and 25 per cent to passenger. You could adopt any one of a number of methods for the purpose of making comparisons month by month, year by year and place by place.

Redirect examination.

By Mr. BUNN:

Q. Mr. Elliott, see if we can make that a little clearer. As I understand your method of accounting you charge to the freight service all expenses which can be definitely and certainly attached
78 to that service, like the wages of the crew of the freight train, the coal that is consumed on the freight train, etc.?

A. That is correct.

Q. Now, when you come to an item which is absolutely indivisible, like the bucking of snow, or the salaries of the general officers, or the cost of keeping up the track, or the cost of painting a station, you would divide that between the passenger and freight in proportion to the train mileage of each?

A. Yes, sir.

Q. Do you know of any better way of dividing it?

A. I do not.

Q. Do you know any way which would show more nearly what the cost of doing the freight business and the passenger business actually was?

A. No, sir.

Q. These expenses that you have spoken of as "indivisible," are in their nature absolutely incapable of being definitely attached to either business?

A. Incapable. We can't do it.

Q. But they are not "in-visible" in the sense of being not actual; they are real expenses?

A. It is real money paid out.

Q. Real money paid out, and must be earned either out of the passenger or freight traffic?

A. That is right.

Q. Do you know whether the Interstate Commerce Commission at one time adopted this method and advised the railroad companies to adopt it?

A. I understand that they did consider that as nearly a correct basis as they could figure out.

Q. As they could figure out?

A. Yes.

Q. It is well recognized in railroad accounting that the kind of

expenses we are speaking of are incapable of any more definite division than by either this arbitrary or some other arbitrary rule?

A. Yes.

Q. Mr. Elliott, you have operated railroads in Illinois, Iowa, Missouri, Kansas and North Dakota, and you have shown that you are familiar with the transportation of coal in each one of those states; tell us whether in your judgment coal can be carried cheaper by railway in the first mentioned states than it can in North Dakota? I am speaking now of the cost of carriage, not the cost of building the railroad or paying interest on it?

A. I think it can be carried cheaper in Illinois, Iowa, Missouri and Kansas than it can in North Dakota.

Q. Do you know anything to justify the lower rate in North Dakota on lignite coal than coal rates in the states you have mentioned?

A. No, sir.

Q. Are the operating expenses of railroads, the physical obstacles and the snow and the weather more favorable to operation in
79 North Dakota than the states you have mentioned?

A. No, sir. I should say as a whole they were a little less favorable.

Mr. BRIGHT: How about the cost of fuel in North Dakota as compared with those other states?

Mr. BURNS: Yes, you may state that.

A. Well, in Missouri and Illinois you can put coal on your engine tanks that is suitable for making steam for not to exceed $1.50 per ton. By the time we get it on our engine tanks in North Dakota it costs from $3.50 to $4.00 a ton.

Q. That is a very considerable item of operating expense, is 't it?

A. A very important item.

Q. Do you know anything about the general administration expenses, or loss and damage expenses, expenses of maintenance of way or maintenance of cars that makes operation more expensive in Illinois and Iowa and Missouri than it is in North Dakota?

A. No, sir. I should say that expenses of that class were a little less down there than they are up here. The wage scale of certain classes of labor in those states is somewhat less than it is in these northern states.

Q. I suppose, Mr. Elliott, one thing that makes the coal business much larger in these states is not only the difference in population, but the great difference in factories and manufacturing industries?

A. Oh, very largely so. You take it in Illinois, Missouri, and even in Iowa, there are a large number of manufacturing institutions, not only at the very big centers, but there is growing up manufacturing interests at the smaller towns. Quincy, Illinois, has over 100 manufacturing enterprises.

EDMUND PENNINGTON, a witness produced on behalf of the defendants, after being first duly sworn, testified as follows in answer to questions by Mr. Bright.

Q. Mr. Pennington, you are the vice president and general manager of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company?

A. I am.

Q. How long have you occupied that place?

A. Eight or nine years.

Q. Before that you were superintendent of the same road for how long?

A. About twelve years.

Q. During your experience as superintendent and manager, have you paid a great deal of attention to the cost of transportation?

A. Yes, sir, more or less.

Q. And the cost of handling all kinds of freight?

A. In a general way, yes.

Q. It has been testified here in this case, the Northern Pacific case, and it is also applicable to ours, that lignite coal is moved in North Dakota in small lots, a car or a car or two at a time; never
80 a train load?

A. Well, with one exception, I guess that is correct on our line.

Q. What is the exception?

A. We get train loads of coal from Wilton down to Bismarck, and there it is distributed.

Q. How far is that?

A. Twenty-seven miles.

Q. Are you acquainted, generally speaking, with the manner in which that coal is handled by the Northern Pacific and Soo and Great Northern?

A. Yes.

Q. Do you agree with the opinion expressed here, or the statement that it is a way freight business rather than a through?

A. Entirely way freight.

Q. You know, generally speaking, about the way coal is handled in other producing centers; the large coal producing centers?

A. In a general way, yes.

Q. How is the coal moved from those mines where they take it to the distributing points?

A. What little experience I have had has been in Iowa, where it was handled usually in train lots, that is, the bulk of it. Of course there was a little of it handled in small lots.

Q. And from your general information would you say that was true of the large coal producing centers in Illinois and everywhere?

A. Well, I presume it is. I don't know about that.

Q. You don't know of your own knowledge?

A. No.

Q. Now, when coal is handled in train loads, what do you say as to the relative cost as compared with handling it in these very trains?

A. In way freights?

Q. Yes.

A. Why, way freights will cost anyway, I should say, from two to three times as much as it would in through trains. A full train.

Q. Is your unit of calculating the expense of moving traffic the ton per mile?

A. Yes, sir.

Q. I mean, when you consider the cost of operation of your railroad, is that your unit?

A. No. Ours is worked out on the basis of the cost of moving 10,000 tons of freight a mile. That is, our operating sheets are made up on that basis.

Q. Now, Mr. Pennington, assuming that the movement of lignite coal on the Northern Pacific under the present rates yields .42 of one mill per ton mile, what is your opinion as to whether that traffic would stand any reduction of revenue?

A. I certainly would not want the traffic at that price.

Q. Do you know of any commodity that is moved by the railroads in this region, the Northern Pacific or the Soo, such commodities as they handle, which yields a less revenue than that?

A. No, I don't.

81 Q. Speaking of the comparison between way freights and through freights, I will ask you a question about coal; would your opinion be any different as to the movement of lignite on way freights, and the general movement of merchandise in North Dakota, in the way trains as they are handled?

A. Why, all the lignite is handled by way freights.

Q. Yes, I know, but comparing that with all through freight train business; main line through freight?

A. It costs much more to handle way freights than it does through freights.

Q. Would you say that the same ratio expressed here by the statement and by Mr. Elliott was approximately right?

A. I should say it was very close. As near as I could get at it.

Q. Speaking of the distribution of expenses between passengers and freight, have you in your experience discovered any better method of arriving at an approximate result than the one testified to by Mr. Elliott?

A. No, I don't know of any better way. They distribute theirs the same as we do, and, in fact, all other roads as far as I know. It is as near a correct way to get at it as you can get.

Q. Bearing in mind, Mr. Pennington, the returns, the revenue earned on the present rates, what would you say as to the ability of the railroad to put in those new rates and make any profit whatever on the business?

Mr. McCue: That is objected to as the mere conclusion and opinion of the witness, and the witness has not shown himself qualified to testify, and the basis upon which the figures are made is not a correct basis.

A. No, it is too low. I think the rates are too low. In fact, it has been demonstrated on our lines that we haul lignite coal on that all our rates are too low.

Q. The present rates?

A. Yes.

Q. What would be your judgment, Mr. Pennington, as to whether you could look for any profit if you put in those rates named in that paper?

Mr. McCUE: I object to that the same as before.

A. Our lines that we handled lignite coal on last year failed to pay operating expenses and interest on the investment into somewhere about $200,000, a little over that, on the present rates.

Q. Have you a judgment as to whether there would be any profit left in the hauling of the stuff at the proposed rates?

A. No, I don't think there would.

Mr. BURNS: You mean, Mr. Bright, anything left above the actual expenses of operation?

Mr. BRIGHT: Yes, above the actual expenses of operation.

A. I don't think there would.

By Mr. BURNS:

82 I would like to have you state, Mr. Pennington, if you can, the ratio of operating expenses to earnings on the Soo road during the last fiscal year in North Dakota?

A. 65.13.

Q. As compared with the Northern Pacific, 58 and a fraction?

A. Yes, I suppose so.

Q. So that Mr. Johnson's computation, applied to the Soo road, would show a still greater loss than it does applied to the Northern Pacific?

A. Yes, sir.

Cross-examination:

By Mr. McCUE

Q. Mr. Pennington, do you receive more coal from the Kenmare and Burlington mines than you do at Wilton?

A. I don't know exactly. I should not think there would be much difference, though. I never have seen the tonnage.

Q. Well, take your main line that runs from Enderlin to Portal, don't you think that the average haul of your coal would be greater than that given by the Northern Pacific, 87 miles?

A. No, I don't think it would.

Q. You don't think it would?

A. No. They have got coal all along that territory. It is a shorter haul until you get away this side of Minot.

Q. Well, you ship a good deal of coal from Kenmare and from Burlington, down as far as Enderlin, do you not?

A. Some, yes, all along there.

Q. And is it not true that coal shipped from Burlington and Kenmare is delivered to the Northern Pacific for transportation at Carrington and Rogers?

A. No, I never knew of any going there. I have known it to go the other way, but none going off our line down there.

Q. Wouldn't it go to the north, too, towards Leeds, on the Jamestown & Northern?

A. They may have shipped some, but I don't know of it.

Q. And don't you ship coal to Cooperstown and McHenry by delivering any at Rogers?

A. I think not.

Q. From Kenmare?

A. I don't think so.

Q. Have you investigated that question, Mr. Pennington?

A. No, I have not.

Q. Would you say, Mr. Pennington, that the volume of coal, the amount of coal which the Soo railway transports in the State of North Dakota is larger than that shown to have been transported by the Northern Pacific Railway Company?

A. I am sure I don't recall their figures. They moved it at so many different places that I didn't add them together. I don't know what their tonnage was.

83 Q. Well, can you give us an estimate of the tonnage that you moved of lignite coal?

A. We moved altogether one hundred and thirty-two thousand tons.

Q. That is, in one year?

A. In one year.

Q. The last fiscal year, ending when?

A. June 30th, I think it was.

Mr. BUNN: We moved 64,000 tons, according to this exhibit.

Q. Mr. Pennington, you have been in the lignite coal mines at Wilton, have you not?

A. I was down there once, yes.

Q. And you know that there is a large body of coal there, do you not?

A. Yes.

Q. Have you been around the mines at Kenmare and Burlington on your line?

A. Some, yes.

Q. Have you investigated the amount of coal deposits there?

A. They are quite extensive.

Q. Now, from your experience from looking at the mines and your investigation, would you say that the coal industry in the State of North Dakota is practically undeveloped at this time?

A. It could be developed more, of course, the more people that they get in the state.

Q. Your road has taken up the question of this lignite coal in North Dakota to a great extent?

A. Quite a little, yes, sir.

Q. You have experimented with it?

A. Yes.

Q. And you are acquainted with the general reports as to the quantity of coal deposits in North Dakota?

A. In a general way, yes.

Q. Wouldn't you say that the deposits of this lignite coal in North Dakota are very large?

A. Very large, yes, sir.

Q. And that as compared with the amount of coal that is there deposited there has been but a small quantity mined?

A. Very small, yes.

Q. Now, don't you think, Mr. Pennington, that if the people of North Dakota could get a reasonably low rate for the transportation of lignite coal that it would tend to develop the lignite coal industry in the State of North Dakota?

A. Why, the rate is so low that I don't think it would cut very much figure on the amount of coal business they are doing.

Q. Which rate do you mean, the one that is in force by the different roads now, or the one fixed by the legislature?

A. The one that is in force by the roads now.

Q. You have investigated the properties of this lignite coal with regard to the heat it will generate per ton, have you not?

A. Yes, sir.

Q. Can you give us a comparison as between a ton of lignite and a ton of bituminous coal?

A. I had a test made once of lignite coal and Youghiogheny coal or Pittsburg coal.

84 Q. What?

A. Pittsburg coal. I sent some samples down to chemists in Philadelphia and had both coals analyzed as to their burning qualities. This was on the basis of briquetting lignite coal, not in its raw state; gave them the price of the coal at different stations along the road, and also the price of eastern coal or Youghiogheny coal; they met at Glenwood. That is 121 miles west of Minneapolis. I have forgotten the figures on what it cost to briquette the coal, but in their briquetting of the coal they put in more burning units in the coal on account of the coal tar binder that they put in, than the coal in its raw state had. By putting the coal in that condition that is as far as it would go east.

Q. How is that?

A. That is as far as it would go east, against the other coal going west.

Q. To Glenwood?

A. Yes, sir.

Q. Now, was that in its natural state?

A. No, sir, it was briquetted.

Q. Briquetted?

A. Yes, sir, using coal tar as a binder.

Q. Well, did you make a comparison in its natural state?

A. No, sir.

Q. Did you make a comparison with the Iowa coal?

A. No.

Q. The lignite is being used a great deal more at the present time than it was some four or five years ago?

A. Why, it is increasing, I suppose, as the people increase.

Q. You are shipping more lignite coal over your road now than you were three or four years ago?

A. Yes, sir.

Q. And isn't that demand brought about on account of the development of the mines?

A. No, I don't think so. You see these mines, very few of them ever last more than a year of two. They fail. There isn't any more mines in operation today that I know of than there was five years ago. They all get in there and lose their money. That is the fact and history of coal mining in North Dakota. I don't think there is a coal mine in existence today on our line that has been in existence five years under the same management. They all fail. Very seldom they run more than two years.

Q. Isn't that on account of the high rates that the railroad companies charge for transporting this coal?

A. No, I think not.

By Mr. Bunn:

Q. Mr. Pennington, is there any reason that you know of from an operating standpoint why there should be a lower rate on lignite in North Dakota than is charged in Iowa on bituminous coal?

A. It should be higher.

Q. It should be higher?

A. Certainly. It costs more to transport it.

By Mr. Bright:

85 Q. Mr. Pennington, at what season of the year is the lignite output the heaviest?

A. Oh, I should think in November and December. October, November and December. Those three months.

Q. October, November and December?

A. November and December are usually the heaviest months.

Q. Ordinarily speaking, what is the condition of your rolling stock then? What is the demand on your rolling stock for other traffic in North Dakota?

A. Usually in those months it is taxed to its full capacity.

Q. And you consider the movement of this lignite as a disadvantage on that account?

A. I do, yes, sir.

W. L. Martin, a witness produced on behalf of the defendants, after being first duly sworn, testified as follows in answer to questions by Mr. Bright.

Q. Mr. Martin you are the general traffic manager of the Soo line?

A. Yes, sir.

Q. And how long have you been general freight agent and traffic manager?

A. About fifteen years.

Q. Are you acquainted with the lignite coal traffic in North Dakota?

A. Yes, sir.

Q. The present rates on lignite, how did they come to be put there?

A. The present rates are the rates we were requested to put in by the railroad commissioners of North Dakota. Previously they were higher and didn't bear quite the same relation to distance, and the commissioners figured out a scale which they thought was fair, and came down and asked us to put them in, which we did.

Q. Do you remember when they were put in?

A. I do not remember the date. Several years ago.

Q. Now, speaking of the development of this business which the Attorney General referred to, to what do you attribute the increased tonnage of lignite coal?

A. Entirely to the increase in population. The distribution is largely in three counties: Ward county, which has doubled many times in population in the last ten years; Wells county, and McLean and McIntosh, I think it is.

Q. Mr. Martin, this testimony here shows in the Northern Pacific operations a profit of one mill per ton per mile for the movement of lignite, on a total cost of 8.408 mills; the proposed rate as it is figured would produce but 6.190 mills per ton per mile; what would be your judgment, Mr. Martin, your opinion, taking into your account your knowledge of the business, whether the traffic would bear the reduction which is proposed in the new bill, in that lay, with a margin of .42 of one mill per ton per mile?

A. And not conducted at an absolute loss?

86 Q. Yes.

A. It could not stand it.

Q. Are you aware, Mr. Martin, in your experience, of any commodity moved in considerable volume for an average distance of 87 miles that is moved for a less profit, or for a profit as low as .42 of one mill per ton per mile?

A. No, sir.

Q. Are you acquainted with the movement of coal in the bituminous coal producing centers?

A. In Illinois especially, yes, sir.

Q. Can you see any reason from the standpoint of your experience in such matters why coal should be moved at a lower rate in North Dakota than Illinois?

A. No, sir. I should say it is fairly entitled to a higher rate in North Dakota than in Illinois.

Q. Why would you say that?

A. In the first place, in Illinois the movement of coal is in maximum train loads and to large centers. There is, of course, more or less distributed, but there is a constant maximum train load movement to large manufacturing places like Peoria, Chicago, Quincy, which Mr. Elliott mentioned, and the local town themselves have so much more population, and use so much more fuel, that they are able to always have practically a full train on a division, noticeably

so in case of all the lines that run into Chicago, the maximum tonnage trains are hauled. In addition to that, the well known difficulties and extra cost of handling coal in North Dakota at the time it moves. There is no movement of lignite coal in North Dakota in the summer time. It is confined to the months when strenuous effort alone can keep the railroads open at all. We handled cars of lignite coal to some of our stations in the storms of two years ago that must have cost us in actual cash expended to get them there, ten times what the gross freight earnings were. The movement is all in that time of the year. There is no movement of lignite coal from the 1st of March to the 1st of September.

Q. In the movement, even in train loads, if such were the condition in North Dakota, it would be attended by much heavier expense than as moved in Illinois?

A. It would always be a hardship in that way. The tonnage of a train on account of the cold weather is reduced about 25 per cent, I think, or something like that; the number of tons an engine can haul in our North Dakota winter as compared with a winter in Illinois.

Q. Every element that goes to make up the cost, save, perhaps, in wages, would be lower in Illinois than in North Dakota?

A. They are never any lower in North Dakota.

Q. Would be lower in Illinois than in North Dakota?

A. Yes, sir.

87 Cross-examination.

By Mr. McCUE:

Q. If the coal industry, that is, the domestic coal industry in North Dakota, was developed to such an extent that you could obtain train loads at your different stations, you could transport it cheaper than you can now on account of the same being transported in carload lots?

A. You must remember, Mr. McCue, that the tonnage of a train is regulated by the capacity of the engine, to start with, and then your ruling grade. In distributing in a state like North Dakota, you might start from the mine or group of mines with a full train, and you might commence to drop it at the very first station and so on all the way, and by the time you got over your division you would not have any left, that is, you might, you know, because the distribution is entirely to local stations, a car or two cars at a time, and you start with a full train, and it might happen, without forcing the question at all, that when you got to the end of the division you would not have a car of coal left.

Q. Well, isn't it true, Mr. Martin, that the coal—

A. And over half—I beg your pardon—would be short haul stuff of minimum forty, forty-five or fifty cent rates.

Q. Isn't it true that the coal operators up there were obliged to curtail the output on account of not being able to get cars at different times?

A. That has happened temporarily for a few weeks at a time,

when your own neighbors, the people who are making North Dakota, were crying for cars to haul their grain. That is in October and November. Our company took a lot of stock cars, all they could rake up, took a lot of flat cars and put boards on them to make gondolas—couldn't be used for anything else—and put them in the coal trade, both up at Carrington and in the Wilton district, and, if you please, hauled them back empty to the mines again, kept them plying there, I think, two or three hundred, weren't there, Mr. Pennington?

Mr. PENNINGTON: Yes.

The WITNESS: Did everything we could. We took box cars, dug up everything that could be loaded and put up there to the stations where they could be loaded with grain.

Q. You didn't quite catch my question, Mr. Martin. You have stated the facts as they now exist. What I am trying to get at is this: if the industry of domestic coal there, called the lignite coal, was developed to such an extent that you could receive train loads of that coal and ship it to your terminal points, you could transport it cheaper than you can transport the coal that you are now transporting?

A. Why I don't know about that. Cheaper per ton per
88 mile, possibly.

Q. Yes.

A. This cost per ton per mile looks pretty fat on paper, but if your haul was only ten miles you would have been better off without it, because you would not earn any money, whereas, the same rate carried for 400 miles would run into fair earnings. You must never forget, as Mr. Bunn brought out, in the Northern Pacific, the short haul as it exists today. What the future may bring we don't know. It might change it, but the haul on the lignite is short, and a rate of, say, half a cent a ton per mile, that you might say you can make a little money on in train loads in a haul of 500 miles, would only amount to $2.50 per car for a haul of, say, ten miles, or whatever it would amount to. The ton per mile rate is all right for a basis, but the distance always confronts you as to how long your haul is.

Mr. BUNN: May I ask the witness a question?

Mr. MCCUE: Certainly.

By Mr. BUNN:

Q. Speaking of short hauls, isn't it true, Mr. Martin, that a short haul involves just as much delay at each terminal, and loading and unloading cars, as the long haul?

A. Most assuredly. It makes just as many movements of the car, just as much clerical work; all the work that you get on a 500-mile haul is involved in a ten-mile haul.

Q. And each car takes just so much time to load or unload at each end, no matter how long your haul?

A. Yes, sir.

By Mr. MCCUE:

Q. Then, if you could transport this coal in train load lots you

could transport it at a much lower rate for a train mile than you are transporting it now, on account of the way it is being shipped?

A. No, I would not want to admit that, because, while perhaps you don't appreciate it, our rate on lignite coal today is a good deal of a contribution to the settling up of the state. We have run a special train of five cars because the people wanted the coal. Didn't earn probably what it cost us.

Q. You did that under very peculiar circumstances?

A. I know, that is very true, but it is the spirit in which we and the other roads have met the people of North Dakota in trying to build up the state. Before we reached lignite coal we hauled wood at a rate we would be ashamed of if we didn't remember what everybody was trying to do, in other words, just to build up the state. From a carrier's standpoint it would be ridiculous, because the only place we could get fuel was out here within seventy-five miles of Minneapolis, and we hauled it way up into North Dakota at a very low rate, not entirely from philanthropy, because it was a good business proposition to not keep people away on account of
89 the price of fuel.

Q. As a matter of fact, Mr. Martin, if you can transport your freight of one kind in train load lots, it can be done at a lower rate than where it is being shipped locally, as you state?

A. Oh, yes, that is well admitted.

Q. This is one of the principal items that goes to figure up the cost of transportation?

A. Yes, sir.

By Mr. BRIGHT:

—. Mr. Martin, something was said about the interchange of coal at Rogers and Carrington between the Soo and the Northern Pacific; is there any considerable amount of that?

A. I could not say. We have no through tariff, but anyone has the privilege of paying the distance tariff to Rogers, and then the Northern Pacific from there, and there are some people, maybe a man operating a coal mine right in the vicinity, and he may have shipped a few cars to his friends; got somebody to take it because he was a dealer, but it is very small. Wouldn't amount to anything.

Q. Also the distribution of anthracite or bituminous in North Dakota from certain places; do you know anything about such a traffic as that?

A. No, there isn't any. Mostly coal that comes into North Dakota from other states is landed at destination in large lots. Goes direct to the point of consumption.

FREDERICK H. PARKER, a witness produced on behalf of the defendants, after being first duly sworn, testified as follows in answer to questions by Mr. Begg:

Q. Mr. Parker, what is your position with the Great Northern Railway?

A. Auditor of freight receipts.

Q. As such, what are your duties?

A. Why, I have charge of the auditing of all freight accounts.

Q. From what do you audit them? What papers come to you from which you audit them?

A. The way bills; abstracts from the agencies.

Q. Those documents show the points from and to which all shipments moved?

A. They do.

—. And the rate at which they move?

A. The way bills show the rate.

Q. It is your duty to compare those with the tariffs and see that the charges are correct, and from that you determine the earnings?

A. Yes, sir.

Q. Mr. Parker, some time last spring I asked you to make out a statement showing all the lignite coal that moved over the Great Northern Railroad between stations in North Dakota, showing the point from which it moved, the tonnage, the ton mileage, the average haul, the earnings under the rates at present in force, and what the earnings would be under this proposed new schedule of rates,
90 etc. Have you prepared such a statement?

A. I have. (Producing paper which is marked Great Northern Exhibit No. 1.)

Q. That is shown on Great Northern Exhibit No. 1?

A. Yes.

Q. You got that up from the abstracts and records in your office?

A. Yes.

Q. And that is a correct statement of the matters it purports to state for the year ending June 30th, 1907?

A. Yes, sir.

Q. Will you please state the result of your averages there?

A. Tons, 8,015; average hauled, per ton, 119.9 miles; revenue per ton per mile, present rates, 8.39 mills per ton per mile; revenue per ton per mile under North Dakota code of 1907, 5.60 mills per ton per mile.

Q. Mr. Parker, from your abstracts and your examination did you find that the coal moved in large quantities or in small quantities; a car or two at a time or in greater bulk?

A. It moves in comparatively small quantities. In fact, the statement shows that some of the points shipped very little in the year, one of them as low as 83 tons in the year.

Q. In what character of trains did it move; that is, in way freight or through freight?

A. Why, it would move in a way freight mostly. Practically all, I should judge.

Mr. Brad: I offer the statement Great Northern Exhibit 1 in evidence.

Q. (Showing witness paper.) Mr. Parker, what is that?

A. Why, this is what we term paper averages of lignite coal rates fixed by North Dakota code of 1907. By paper averages we mean the average of all of the coal in North Dakota moved the same distance

the number of tons each distance covered by the coal, from one to 500 miles.

Q. That is that you assume that the same tonnage moves every distance for which that law fixes a rate?

A. Yes, sir.

Q. And if that were the case what would be the average revenue per ton per mile under these rates?

A. It would be 4.164 mills per ton per mile.

Mr. Begg: I offer this statement in evidence as an illustration, and it may be marked "Great Northern Exhibit No. 2."

(No cross-examination.)

JOHN A. SANDBERG, a witness produced on behalf of the defendants, after first being duly sworn, testified as follows, in answer to questions by Mr. Begg:

Q. Mr. Sandberg, what is your position in the Great Northern?

A. Auditor of disbursements.

91 Q. As such you have under your charge the accounts of expenditure for operation?

A. Yes, sir.

Q. And matters of that kind. Have you prepared a statement showing the operating expenses of the Great Northern Railroad within the state of North Dakota for the year ending June 30th, 1907?

A. Yes, sir.

Q. (Showing witness paper.) Is that the statement you prepared?

A. Yes, sir, that is the statement I prepared.

Q. Was that statement made up by you from the records and books of the Great Northern showing expenditures during that year for operation in North Dakota?

A. Yes, sir.

Q. And that is a true and correct statement of the operating expenses in North Dakota for that year?

A. Yes, sir.

Q. Into what different accounts have you divided the operating expenses on that statement?

A. Four general accounts: conducting transportation; maintenance of equipment; maintenance of way and structures, and general expenses.

Q. Then you have added the taxes as one item?

A. Yes, sir, taxes.

Q. That is, the actual taxes paid on the properties in North Dakota, isn't it, Mr. Sandberg?

A. That is the actual levies in the state of North Dakota, yes, sir.

Q. Then you have added the item of depreciation of equipment; I would like to have you explain that item as distinguished from maintenance of equipment?

A. Depreciation of equipment is a charge that is made to operat-

ing expenses, and credited to a fund to be used in replacing equipment as it is gradually worn out.

Q. Becomes unfit for repair?

A. Becomes unfit for repair.

Q. And is the amount of that fund set apart every year based on the experience of the company?

A. Yes, sir.

Q. That is as nearly correct as it can be figured out?

A. Yes, sir.

Q. And it is also required that you keep that account, and charge operating expenses, by the Interstate Commerce Commission, isn't it?

A. Yes, sir.

Q. You have then divided each of these items, the operating expenses in North Dakota, between freight traffic and passenger traffic?

A. Yes, sir.

Q. Now, will you state in a general way on what basis you have divided it? Are there any items which are or can be absolutely charged to the freight business or to the passenger business?

92 A. Yes, sir, there are a great many items that are charged direct to the freight and to the passenger business.

Q. Give an illustration.

A. Well, under the head of general expenses, for instances, the passenger traffic department is all charged direct to that, and the freight traffic department is all charged direct to the freight. Under maintenance of equipment the freight train cars would be all freight, and the passenger train cars all passenger. Locomotives, of course, are not always divisible, because they are used in both freight and passenger service. Under maintenance of way and structures we have a great many cases where we have a separate passenger station building. At such stations the maintenance of these buildings would be charged entirely to the passenger business, and so on.

Q. Every item that is exclusively passenger or exclusively freight has been charged by you to the proper service?

A. Yes, sir.

Q. Then such other items as are common to both, for instance, in your maintenance of way and structures, how is that divided?

A. Divided on the basis of train mileage.

Q. Train mileage or general expense?

A. Train mileage.

Q. Is train mileage as accurate as any method of division you know of?

A. Yes, sir, it is so considered by nearly all the railroads. In fact at one time the interstate commerce commission made a ruling that the expenses should be divided on that basis.

Q. It is the usual and common method which railroads have adopted, isn't it, as far as your experience goes?

A. Yes, sir.

Q. What does your statement show to be the cost of conducting transportation per ton per mile of all freight business in North Dakota for the year ending June 30th, 1907?

A. It shows 2.4 mills.

Q. And what was the average cost per ton per mile of transacting freight business in North Dakota for that year?

A. 5.1 mills.

Q. Then the items of maintenance of equipment, maintenance of way and structures, general expenses, taxes, and depreciation of equipment that were charged to the freight service, amounted to 2.7 per ton per mile?

A. Yes, sir, that is the difference between the two.

Q. Now, it has been testified here, Mr. Sandberg, by Mr. Elliott and Mr. Pennington that the cost of conducting transportation in way trains, the way freight train service, is at least twice the average cost of conducting transportation; assuming that to be true, what would be the actual cost of hauling this lignite coal in North Dakota, assuming that it moved in way freights, as Mr. Perkins has
93 testified?

A. Assuming two and a half times or twice?

Q. Well, they said at least twice; I think we will take it twice.

A. It would be 7½ mills.

Q. Per ton per mile?

A. Per ton per mile.

Mr. BUNN: If it is two and a half times——

A. It would be 8.7 mills.

Q. And the operating expenses as you have made them up for North Dakota, cover the expense of transacting all freight business which moves over the lines in North Dakota; that is, it includes the business local to North Dakota, the business beginning in North Dakota and passing into another state, the business beginning in another state, going into North Dakota and passing clear through North Dakota.

A. Yes, sir, it includes all freight business.

Q. Including the long haul business through Dakota?

A. Yes, sir.

Mr. BEGG: I offer this statement, Great Northern Exhibit 3, in evidence.

Q. Now, Mr. Sandberg, as bearing upon the propriety of your division of operating expenses between freight and passenger, have you made up a statement of the actual earnings of the Great Northern Railway Company from its passenger business in North Dakota?

A. I didn't work up the passenger figures, Mr. Begg.

Q. You had that work done, however, for you, didn't you?

A. Yes, sir.

Q. By Mr. Tilton, the auditor of passenger receipts?

A. Yes, sir.

Q. What were the passenger earnings according to his statement?

A. The total was $2,531,587.17.

Q. And what were the expenses you charged to the passenger business on your basis of division?

A. $2,634,039.50.

Q. Was there a profit or loss on the passenger business?

A. There was a loss of $102,452.33.

Mr. BEGG: I offer this statement in evidence to be marked Great Northern Exhibit No. 4.

Mr. MCCUE: That is objected to as immaterial.

Cross-examination.

By Mr. KELLY:

Q. I just want to get your distinction that you draw between the two items set forth in this statement, the first one entitled "Maintenance of Equipment," and the other "Depreciation of Equipment." I didn't quite get your distinction in reply to the direct examination.

A. A depreciation of equipment is an account that is
94 charged up as a part of the cost of operation, and, as stated before, it is required by the interstate commerce commission, to provide a fund for the replacement of equipment when it is no longer fit for service.

Mr. BEGG: And no longer fit to repair.

A. And no longer fit to repair.

Q. What is your maintenance of equipment?

A. It is the repairs to locomotives and cars. Actual cost.

Q. Replacing?

A. No, sir.

Q. Then when equipment is entirely unable to be repaired, that comes within the item of depreciation of equipment, does it? That is, certain equipment that can not be repaired, that you would class with the item depreciation of equipment?

A. Well, I don't know as I quite understand what you mean.

Q. Well, as I understand it everything that comes within this item, depreciation of equipment, is such as cannot be repaired?

A. Yes, sir.

Q. It is entirely worn out; its usefulness is gone; cannot be repaired?

A. Yes.

Q. Now, then, that must be replaced?

A. Yes, sir.

Q. By new equipment. Now then, that new equipment comes under the item of maintenance of equipment, does it not?

A. Why, when a charge for depreciation of equipment is made, there is a corresponding credit to the replacement fund, and when the new equipment comes it is taken out of that fund. It is not charged up to operating expenses.

Q. Is this replacement fund to which the credit is given, does that appear upon the statement?

A. No, sir.

Q. Shouldn't that appear in order to give us a full and complete statement here of the cost of operating?

A. No, sir, I don't think so.

Q. Isn't that an offset of the charge that you make here for depreciation of equipment?

A. It offsets the charge in the operating expense account, except

that the fund is created, and the new equipment is charged to the fund when it is purchased.

Q. Well, this statement shows merely the charges made?

A. Yes, sir.

Q. It does not show the corresponding credit?

A. It is the percentage of depreciation in the equipment. The wear and tear.

Q. Is this item, $440,556.87, is that based upon actual outlay, expenditure, that item?

A. No, sir.

Q. Or is it just an approximate estimate?

A. It is an approximate estimate.

95 Q. Does that remain the same from year to year or do you change it?

A. Remains the same.

Q. So that each year, for instance in 1908, the depreciation of equipment is the same figure as it was in 1907?

A. Not necessarily. We may have a great deal more equipment on hand which has been purchased during the past year, which would increase the depreciation charge. It depreciates from the time it is purchased or received.

Mr. BRIGHT: You mean that the percentage that you charge remain- the same?

A. Yes, the percentage of depreciation remains the same each year.

Q. In what way then is this credit item taken into account or given consideration, this corresponding credit?

A. It has nothing to do with operating. With the operation end of it.

By Mr. MCCUE:

Q. Do you mean to tell us that there was an actual loss in the business in North Dakota during the last fiscal year?

A. I don't know. My figures show there on the passenger. Do you refer to the freight or passenger?

Q. Well, to both?

A. The figures show there was on the passenger there. I don't believe I have the freight revenue figures to compare with my expenses.

Q. As I understand you, you set apart each year a percentage of the earnings, and that account is designated as "maintenance of equipment."

Mr. BEGG: Depreciation of equipment.

Mr. MCCUE: No, I am talking about maintenance of equipment.

Mr. BEGG: That is the actual expense.

Mr. BUNN: What it costs to repair.

The WITNESS: That maintenance of equipment is the actual amount expended in keeping up the equipment.

Q. That is the actual amount expended in keeping it up?

A. Yes, sir.

Q. That goes for repairs and such things?

A. Yes, sir.

Q. Now, to this, and also the conducting of transportation you add the depreciation?

A. Yes, sir.

Q. For instance, in this Exhibit 3, you have added to the expenses of the freight department, $440,556.87?

A. Yes, sir.

Q. That amount is set aside from the earnings of the freight department to care for the depreciation in your equipment?

A. Well, of course all the operating expenses come out of the earnings, yes.

Q. You say this sum is set aside to replace the depreciation that was occasioned in your equipment?

A. Yes, sir.

95 Q. So that the idea of railroading is to set aside funds so that your equipment may at all times keep intact?

A. Yes, sir.

Q. From one time to another this sum of money which you set aside annually, or at certain stated periods, is used for the purpose of purchasing new equipment?

A. Yes, sir.

Q. And then you charge that item to operating expenses?

A. Charge the depreciation, yes, sir.

Q. So that you aim to keep up your equipment from the earnings of each department?

A. Yes, sir.

Q. Then you would be charging practically your new engines, cars and other items of equipment to operating expenses?

A. Gradually as they are worn out, yes, sir. So much a year depreciation.

Q. Then the Great Northern Railroad Company have purchased their rolling stock out of the earnings of the freight department, and that is the way they figure a loss, isn't it?

A. Well, we have not figured it all out of the freight department.

Mr. McCUE: Well, I was just trying to find out how you figured that you run these roads at a loss, and I have just found out.

By Mr. BEGG:

Q. (Showing witness paper.) Mr. Sandberg, will you take that statement, Exhibit 3, and look at it; the item of "Conducting Transportation;" what does that represent there; money actually expended, or a fund charged up somewhere?

A. That is actual expense.

Q. What does the item "Maintenance of Equipment" represent; actual expenditures or a fund charged up?

A. Actual expenditures.

Q. During this year?

A. Yes, sir.

—. "Maintenance of way and structures:" is that a fund or money actually expended during the year?

A. It is actual expenditures during the year.

—. "General expenses" what is that?

A. That is actual expenditures during the year.

Q. Have the taxes been paid?

A. Yes, sir.

Q. That is an actual expense?

A. Yes, sir.

Q. Now, "Depreciation of Equipment." "Maintenance of Equipment" covers what?

A. The actual cost of labor and material in maintaining the equipment.

Q. Making ordinary running repairs?

A. Making ordinary running repairs.

Q. Suppose a car is destroyed, bur-ed up in a wreck, and there is nothing to repair; do you ever charge that to maintenance of equipment?

A. No, sir.

97 Q. What do you charge it to? If you buy a new car to replace that, out of what fund is it paid?

A. It is taken out of the depreciation fund.

Q. Suppose instead of destroying a piece of equipment that has been bought and owned by the Great Northern it increases the quantity of its equipment by purchasing 150 locomotives; does it charge that to depreciation of equipment?

A. No, sir.

Q. That goes into the capital account, doesn't it?

A. Goes into the cost of equipment, yes, sir.

Q. So that depreciation of equipment nor maintenance of equipment represent no additions to the equipment except such new equipment as is bought to replace equipment that has once been owned by the company, which has been destroyed or otherwise gone out of service?

A. That is all.

Q. How was the percentage of depreciation which is charged every year to operating expenses, using that term in a broad way, how is that determined?

A. Why, I think it was based on the average life of the equipment.

Q. It was discovered that equipment lasts so many years?

A. Yes, sir.

Q. And that a certain percentage of its wearing out would occur in each year?

A. Yes, sir.

Q. And that was charged to the operating expenses for that year?

A. Yes, sir.

Q. Is that method of bookkeeping in the Great Northern prescribed by any official body?

A. Yes, sir.

Q. By what body?

A. The interstate commerce commission at Washington.

Q. Does it prescribe these different accounts that you have mentioned for operating expenses?

Mr. McCUE: That is objected to as incompetent and immaterial.

A. Yes, sir.

Q. Does it require you to charge off a certain amount for depreciation of equipment, and create a fund to replace equipment?

A. Yes, sir.

Q. And this charge is made in accordance with those requirements?

A. Yes, sir.

DEFENDANT'S EXHIBIT A.

Northern Pacific Railway Company.

Statement Showing Number of Carload Shipments of Lignite Coal Forwarded from Lehigh and Bismarck to Points Named, for Year Ending June 30, 1908.

98 To—	From Lehigh No. of cars.	From Bismarck No. of cars.
Adrian	1	
Apple Creek		2
Alfred		2
Buchanan	3	1
Burleigh	1	10
Barlow	1	3
Bowdon	1	3
Breckenridge	1	
Buttzville		1
Buffalo		4
Binford		4
Berlin		1
Brinsmade		1
Brofy		1
Cleveland	1	4
Casselton	1	4
Cooperstown	11	49
Carrington		7
Chasley		2
Crystal Springs		2
Crookston		1
Dickinson	623	
Dawson	6	24
Dazey	1	3
Dickey		4
Driscoll		25
Davidson		2
Denhoff		4
Esmond	1	

99

To—	From Lehigh— No. of cars.	From Bismarck— No. of cars.
Eckelson	1	1
Elliott		2
Eldridge		6
Englevale		1
Embden		2
Edmonds		2
Forsythe	1	
Fargo		2
Flora		1
Glendive	83	
Gladstone	20	
Grand Rapids		2
Goodrich		9
Gackle		4
Glover		1
Grafton		9
Hebron	71	
Hazelton	1	5
Hannaford		2
Hastings		1
Heaton		2
Jessie	5	1
Jamestown	190	197
Jud		4
Knowlton	1	
Kathryn	2	2
Linton	2	42
Leeds	2	2
Lovell		3
Lisbon		21
La Moure		16
Litchville		2
Leonard		1
Mapleton	4	2
Mandan	77	296
Medina	3	3
Montpelier	3	1
McKenzie	3	19
Milnor	1	13
Myra	1	
McHenry		2
Minnewaukan		5
Mose		1
Mercer		1
Maddock		1
Mooreton		3

100 To—	From Lehigh— No. of cars.	From Bismarck— No. of cars.
Melville		1
McClusky		10
Moorhead		3
Nome		1
New Rockford		28
Oberon	1	1
Oakes	1	
Oriska		1
Pingree	1	4
Richardton	7	
Rhodes		3
Sheyenne	3	4
Sims	1	
Steele		52
Shephard		6
Streeter		6
Sheldon		11
Sterling		2
Sykeston		3
Sanborn		3
Tower City	3	
Tappen		9
Turtle Lake		1
Urbana	1	
Valley City	77	33
Verona		1
Wheatland	1	1
Woods	1	
Walum		1
Windsor		2
Warren		4
Winnipeg Jct.		1
Ypsilanti	1	
Total	1223	1046

101

Defendant's Exhibit B.

Northern Pacific Railway Company.

Statement Showing Tons, Ton Miles, Northern Pacific Revenue, Average Haul, Average Rate per Ton per Mile, and Average Revenue per Car on Carload Shipments of Lignite Coal Forwarded from Points Named, for the Year Ending June 30, 1908:

From—	Tons.	Ton miles.	Nor. Pac. revenue.	Average haul.	Av. rate per t. per mile in cts.	Average revenue per car.
Blue Grass						
Lehigh	32,755	2,748,085	$22,780.26	83.90	.829	$18.63
Sims	2,736	160,685	1,686.56	58.73	1.050	17.57
New Salem	169	13,877	125.06	82.11	.901	20.84
Total	35,660	2,922,647	$22,591.88	81.96	.841	$18.56
Bismarck—Received from Soo line	28,597	2,668,346	24,757.00	93.31	.928	23.67
Total	64,257	5,590,993	$49,348.88	87.01	.883	$20.81

Office of Auditor Freight Receipts,
St. Paul, Minn., *Sept.* 15, 1908.

102 DEFENDANT'S EXHIBIT C.

North Dakota Legislative Coal Rates.

The Northern Pacific report to the Railroad Commission of North Dakota for the fiscal year ending June 30, 1908, will show the following data bearing on the business of the company for that year:

Gross earnings	$9,593,089.01
Operating expenses	5,603,704.28
Ratio of operating expenses to earnings, per cent	58.414
Freight revenue	6,432,126.60
Tons of revenue freight carried	3,346,863
Tons of revenue freight carried one mile	743,466,035
Average distance carried in the state, miles	222.14
Rate per ton per mile, mills	8.652

The exhibit attached shows that the lignite coal business in North Dakota for the same period produced a

Revenue of	$49,348.88
Tons carried were	64,257
Tons carried one mile	5,590,993
The average distance carried was, miles	87
The average rate per ton per mile was, mills	8.83
The average revenue per car was	$20.81
And that at the rates proposed by the legislature this business would have produced a revenue of	$36,311.49
A reduction of	13,037.39
Equal to, per cent	26.42
The average rate per ton per mile would be, mills	6.49
The average earnings per car load would be	$15.52
The average earnings per car mile would be	17.84

Applying the ratio of operating expenses for all business in the state to the freight business (and from an investigation it has been determined that the result would vary only a fraction from that arrived at by the use of arbitrary bases for dividing expenses common to both classes of business), and we have the following results:

Average rate per ton per mile received (as hereinbefore shown) was, mills	8.652
Operating expenses, per cent	58.414
Makes cost per mile for all freight, mills	5.054

This cost covers business with an average haul in the state of 222 miles, or two and one half times the average haul of the lig-
103 nite coal business. Furthermore, it includes business passing through Dakota hauled as high as 2,000 miles, in connection with which little or no terminal service is required in the state.

The exhibit attached shows that the lignite coal business, during the year used herein, was distributed to 108 different points on the main line and branches of the Northern Pacific in the state of North Dakota. The average haul of 87 miles being less than the length of any one main line operating district in the state, it necessarily follows that this coal should be classified as way freight and branch line train business.

An investigation discloses that main line way freights and branch line trains carried only one third of the paying tonnage that is carried in main line through freight trains, and that the latter trains carry two and one half times as much gross tonnage. It is, therefore, fair to assume that the cost of conducting transportation in connection with this short haul lignite coal business is at least two and one half times that of the average for all business.

In the average operating cost per ton mile of 5.054 mills, hereinbefore shown, there is included for conducting transportation 2.236 mills, so that we have the following figures as representing a fair amount of the cost of handling this coal:

Average cost per ton per mile for all freight, (including 2.236 mills for conducting transpn.), mills	5.054
Add—for additional cost of cond. transpn. 150 per cent of 2.236 mills, or 3.354 mills or mills	3.354
Or a total cost per ton per mile of, mills	8.408
As hereinbefore shown, the rates proposed by the state would produce, mills	6.490
So that the company would be losing on each ton mile of lignite coal, mills	1.918
Equal to, per cent	29.5
The average rate per ton per mile at present received on this business, as hereinbefore shown, was, mills	8.83
The cost shown above is	8.41
A profit of, mills	0.42
Equal to, per cent	5

The cost figures herein used do not include taxes or other fixed charges.

Great Northern Railway Company.

Statement Showing Shipments of Lignite Coal Local to the State of North Dakota on Basis of Present Rates and on Basis of Rates per North Dakota Code of 1907, Year Ending June 30th, 1907.

To all stations in North Dakota from—	Tons.	Ton mileage.	Average haul, miles.	Revenue.			Revenue per ton per mile.	
				Present rates.	N. D. Code, 1907.	Difference.	Present rates.	N. D. Code, 1907.
Minot	2,179	160,796	73.8	$1,795.82	$1,168.14	$627.68	$.01117	$.00726
White Earth	1,430	134,249	93.8	1,279.57	845.16	434.41	.00953	.00629
Millers	1,392	185,281	133.1	1,525.36	1,010.54	514.82	.00823	.00545
Standard Spur	2,431	438,584	180.0	3,028.06	2,068.12	959.94	.00690	.00471
Des Lacs	83	1,419	17.0	38.52	27.98	10.54	.02714	.01972
Avoca	290	12,460	43.0	171.60	122.80	48.80	.01377	.00986
Williston	210	28,720	136.8	223.60	153.30	70.30	.00779	.00534
Totals	8,015	961,509	119.9	$8,062.53	$5,396.04	$2,666.49	$.00839	$.00561

Accounting Department, 4–3, 708, 8–169 1-2.

105 GREAT NORTHERN EXHIBIT No. 2.

Great Northern Railway Company.

Memorandum Showing Paper Average of Lignite Coal Rates Fixed by North Dakota Code of 1907.

Miles.	Rate per ton.	Tons.	Revenue
1– 10	$.30	10	$3.00
11– 15	.35	5	1.75
16– 20	.37	5	1.85
21– 25	.38	5	1.90
26– 30	.40	5	2.00
31– 35	.41	5	2.05
36– 40	.43	5	2.15
41– 45	.44	5	2.20
46– 50	.46	5	2.30
51– 55	.47	5	2.35
56– 60	.49	5	2.45
61– 65	.50	5	2.50
66– 70	.52	5	2.60
71– 75	.53	5	2.65
76– 80	.55	5	2.75
81– 85	.56	5	2.80
86– 90	.58	5	2.90
91– 95	.59	5	2.95
96–100	.61	5	3.05
101–105	.62	5	3.10
106–110	.64	5	3.20
111–115	.65	5	3.25
116–120	.67	5	3.35
121–125	.68	5	3.40
126–130	.69	5	3.45
131–135	.71	5	3.55
136–140	.72	5	3.60
141–145	.74	5	3.70
146–150	.76	5	3.80
151–155	.78	5	3.90
156–160	.80	5	4.00
161–165	.82	5	4.10
166–170	.84	5	4.20
171–175	.86	5	4.30
176–180	.87	5	4.35
181–185	.89	5	4.45
186–190	.91	5	4.55
191–195	.93	5	4.65
196–200	.95	5	4.75
201–210	.97	10	9.70

Great Northern Exhibit No. 2—Continued.

Miles.	Rate per ton.	Tons.	Revenue.
211–220	.99	10	9.90
221–230	1.01	10	10.10
231–240	1.04	10	10.40
241–250	1.06	10	10.60
251–260	1.09	10	10.90
261–270	1.11	10	11.10
271–280	1.14	10	11.40
281–290	1.17	10	11.70
291–300	1.19	10	11.90
301–310	1.20	10	12.00
311–320	1.24	10	12.40
106			
321–330	1.26	10	12.60
331–340	1.29	10	12.90
341–350	1.31	10	13.10
351–360	1.34	10	13.40
361–370	1.36	10	13.60
371–380	1.39	10	13.90
381–390	1.41	10	14.10
391–400	1.44	10	14.40
401–410	1.47	10	14.70
411–420	1.49	10	14.90
421–430	1.51	10	15.10
431–440	1.54	10	15.40
441–450	1.56	10	15.60
451–460	1.59	10	15.90
461–470	1.61	10	16.10
471–480	1.64	10	16.40
481–490	1.66	10	16.60
491–500	1.69	10	16.90
Total			$521.55

The above statement is made on the basis of one ton shipped each distance mentioned in tariff, that is—one mile, two miles and so on up to 500 miles, the result being 125,250 ton miles—rate per ton per mile 4.164 mills. Ton miles are arrived at by arithmetical progression as follows:

500 plus 1 equal 501; 501 divided by 2 equals 250.5; 250.5 multiplied by 500 equals 125,250.

Accounting Department, 4-30-'08. 8-173.

107 GREAT NORTHERN EXHIBIT NO. 3.

Great Northern Railway Company.

Statement Showing Operating Expenses, Taxes, and Depreciation of Equipment, State of North Dakota, Fiscal Year Ended June 30th, 1907.

Expenses.	Freight.	Passenger.	Total.
Conducting transportation	$2,181,039.97	$1,106,455.07	$3,287,495.04
Maintenance of equipment	787,145.13	396,994.91	1,184,140.04
Maintenance of way & structures	827,995.46	759,929.48	1,587,924.94
General expenses	120,571.47	82,576.87	203,148.04
Total operating expenses	$3,916,751.73	$2,345,956.33	$6,262,708.06
Taxes	283,366.03	117,938.53	401,294.56
Depreciation of equipment	440,556.87	170,744.64	611,301.51
Total	$4,641,264.63	$2,634,639.50	$7,275,304.13

Tons one mile	911,963,430
Expenses of operation per ton mile for	
Conducting transportation	.24c.
Total expenses	.51c.

Operating expenses are divided between states as follows:

(1) All items that can be located are charged actually.

(2) Some other items can be located actually to accounting divisions, and when these divisions cross state lines, the proportion of expense chargeable to each state are ascertained by use of percentages based on main track mileage of that accounting division in each state.

(3) Other items are common to the entire line, and are apportioned to accounting divisions by percentages based upon train, engine or car mileage, according to which seem the most appropriate. When accounting divisions cross state line, each state's proportion is ascertained as in (2).

Taxes are the actual levies for North Dakota.

Depreciation of equipment—North Dakota proportion based on percentage of locomotive, car or track miles in state, compared with total for whole system.

108 GREAT NORTHERN EXHIBIT NO. 4.

North Dakota.

Fiscal Year Ended June 30th, 1907.

(*Expenses Divided on Train, Car, and Engine Mileage.*)

	Interstate.	Intrastate.	Total.
Passenger revenue	$1,226,068.72	$1,305,518.45	$2,531,587.17
Passenger operating expenses, taxes and depreciation			2,634,089.50
Net loss			$102,452.33

Exhibit 1.

Surrey Station, *November* 16, 1908.

Consignee's receipt; consignee, Bond Lumber Company, to Great Northern Railway Company, Dr.; for charges on articles way-billed from Minot. Date of way-bill, November 13, 1908; series and number of way-bill, 616; Car Initials and Number, Soo, 10001; Consigner, Soo; Articles and marks, Lignite coal; weight, 62,100; rate, 40; freight, $12.42; advances, $10.97; total to collect, $23.39; date received, November 16, 1908; receiver's signature, C. H. Very.

Exhibit 2.

Surrey Station, *November* 23, 1908.

Freight Bill; consignee, Bond Lumber Company, to Great Northern Railway Company; for charges on articles way-billed from Minot. Date of way-bill, November 22, 1908; series and number of way-bill, 1205; car initials and number 4206; consigner, Soo Co.; Articles and marks, lignite coal; weight, 43,500; rate, 40; freight, $8.76; advances, $7.50; total to collect $16.26; received payment, C. H. Very, agent; November 23, 1908.

109 On the 16th day of December, 1908, the following testimony was taken and proper return made thereof to the said supreme court:

In the Supreme Court of the State of North Dakota.

State of North Dakota on the Relation of T. F. McCue, Attorney General.

vs.

Northern Pacific Railway Company.

Testimony Taken on the Part of the Relator at Fargo, N. Dak., This 16th Day of December, 1908, Pursuant to the Stipulations Heretofore Entered into.

It is hereby further stipulated that the evidence taken on this hearing shall be considered the same as the evidence taken on behalf of the defendants. That the witnesses be sworn and their evidence taken in shorthand and extended by the stenographer and that when the same is done it have the same force and effect as depositions taken. The signing up of the evidence by the several witnesses is hereby waived.

T. F. McCue, attorney general, appears on behalf of the relator. Messrs. Ball, Watson, Young & Lawrence, for the defendants.

Thereupon the following proceedings were had:

AMASA P. PEAKE, a witness produced on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCUE:

Q. What is your name?
A. A. P. Peake—Amasa P. Peake.
Q. Where do you reside, Mr. Peake?
A. Valley City, North Dakota.
Q. How long have you resided in Valley City?
A. Since June 1, 1881.
Q. What is your business Mr. Peake, with reference to the handling of coal?
A. I am what is commonly called a coal operator. I am interested in the production of lignite coal in North Dakota.
Q. Where are your mines situated?
A. At Lehigh, North Dakota, and Scranton, Bowman county, North Dakota.
Q. How long have you and your associates been operating the mines which you have just referred to?
A. I have been interested in the mine at Lehigh since 1897, and the mine at Scranton was opened in September, 1907.
110 Q. Have you examined those mines personally?
A. I have.
Q. Are you acquainted with the quantity of coal in your mines and in the vicinity?

Mr. WATSON: Defendants object to this question and the evidence sought to be elicited thereby for the reason that the same is incompetent, irrelevant and immaterial and does not affect any of the issues involved in this suit.

A. I am.
Q. State what the depth of the vein of coal is in the first mine you have mentioned in your testimony. Describe it fully.

Mr. WATSON: Same objection.

A. The mine at Lehigh, North Dakota is in a coal measure averaging eleven feet in thickness. This measure has been developed by underground workings aggregating more than a mile in extent and has been tested by drill holes over an area of 320 acres, showing an average thickness of vein of eleven feet.
Q. Is the country surrounding this Lehigh mine for any considerable distance a coal-bearing country?

Mr. WATSON: Same objection.

A. Apparently the same vein which is operated at Lehigh outcrops on Spring Creek, four miles south of the Lehigh mine where the thickness of the vein is eight feet.
Q. In your research and investigation of the lignite coal of this state I will ask you to state what you know about the general supply of coal throughout the coal-bearing districts in this state. That is,

give us an idea of what you know with reference to the extent of the coal fields in this state.

Mr. WATSON: Same objection.

A. The general coal deposit of the state of North Dakota is found in a clay formation lying horizontal to the surface of the surrounding country and apparently in position as though laid down. The deposit extends over the largest part of the western half of the state of North Dakota, but a large portion of this deposit is not available for mining purposes as the clay formation is such that any vein of less than seven feet in depth cannot be profitably mined. The veins which I have examined which show this depth are comparatively few in number. They extend generally in a northwesterly to southeasterly direction and are frequently a mile or more in width. To particularize, at Lehigh, North Dakota, the vein is as shown by working and outcroppings, approximately one mile in width and from the best of my knowledge and belief extends at least five miles from northwest to southeast.

111 Q. Then, Colonel, do you consider this Lehigh deposit a vast deposit—a large one?

Mr. WATSON: Objected to as immaterial.

A. The deposit at that point is one of the large deposits of the state.

Q. And about how many years would that deposit last the way that you are now mining the coal in that vicinity?

Mr. WATSON: Same objection

A. Our estimates give us 100 years of mining at the rate of 300 tons per day on the property owned and controlled by J. F. Brodie and myself at Lehigh.

Q. And the property that you refer to as the Lehigh property—would you say that all of that was a proposition which can be mined profitably?

A. It can. All of the coal measure there can be mined at a reasonable cost.

Q. And the entire deposit you consider merchantable?

A. I do.

Q. Tell us about the amount that your company has gotten out of the Lehigh mine in the last fiscal year?

Mr. WATSON: Objected to as irrelevant and immaterial.

A. We have mined and shipped from Lehigh during the past year approximately 15,000 tons of lignite coal. I can not give the exact amount as I have not been able to examine the books since called upon for this hearing.

Q. How is the demand for lignite coal of the state?

A. The demand is very largely a local demand close to the mines—the present demand.

Q. To what points have you in the last year or since you have been engaged in the coal business, shipped coal from Lehigh?

A. We have shipped coal as far east as Fargo in limited amounts.

Q. That would be in carload lots?

A. Yes, sir.

Q. Has the demand for coal been greater than you could supply as a general proposition?

A. During the months of October and November each year the demand is very heavy and calls for the utmost production of which the mines are capable. During the balance of the year, however, the mines could produce much more than the present output and if the demand were more steady the capacity of the mines could be greatly increased as a mining community would be built up around them. At present the mines are dependent for the bulk of their labor upon the floating miners who drift back and forth between the eastern and southern coalfields and those of Montana. The mine at Lehigh is equipped with undercutting machinery,
112 cars and mining tools to a point where it could, without further additional equipment, produce 500 tons per day.

Q. Colonel, your mines have not been able, as I understand you, to supply the amount of coal demanded during the months *months* of October and November of each year?

A. The last two years we have been able to take care of our business in that respect, since increasing our equipment. Prior to that we were unable to do so.

Q. If the demand were sufficient could you at the Lehigh mine mine coal enough so that you could ship it in train-load lots?

Mr. Watson: Objected to as immaterial.

A. We could ship an average of twenty cars per day from the present workings of the Lehigh mine with a slight additional expenditure for equipment.

Q. And, Colonel, are you acquainted with about the number of cars that would constitute a train of coal with the average capacity?

A. It would be approximately forty cars of twenty-five tons each.

Q. Then, in two days from that one point the mine would be able to load and ship a train of coal?

A. We would.

Q. Colonel, tell us what, in your judgment, from your experience in handling coal, is the cause, if any, for the demand for lignite not being greater than it is, or the several causes?

Mr. Watson: Objected to as being immaterial.

A. The causes are the fact that lignite is essentially a lower grade of fuel than the bituminous coals of Pennsylvania and the anthracite of the same section; the fact that the lignites carry a larger percentage of moisture than the coals mentioned and lose more in shipment by evaporation than do these coals; the fact that the competition of the eastern coals in our territory is very great, and that the freight rates do not take into consideration, in my judgment, the difference in the value, actual and fuel, of the two classes of coal; that is the present freight rates that the several railway companies have in force now. I mean the freight rates the several railway companies have in force, and not the rates as prescribed by the laws of 1907.

Q. I will ask you to state whether or not, from your experience and your knowledge of the coal business, if the rates as prescribed by the laws of 1907, were put in force by the several railways, whether that would increase *of* diminish the demand for coal——

Mr. WATSON: Objected to as irrelevant and immaterial.

Q. (continued). —the lignite or native coal of this state?

113 A. My belief is that if the rate as specified by the law passed in 1907 were in effect, that it would tend to greatly increase the use of lignite coal in mills and other manufacturing plants in North Dakota.

Q. If that rate as prescribed — the laws of 1907 were put in force by the several railways, would it increase the demand for lignite coal to the extent that it would enable the operators to ship coal in train load lots?

Mr. WATSON: Objected to as irrelevant and immaterial.

A. My belief is that it would. However, these train loads would probably have to be broken before reaching destination, as it is hardly possible that any one community would be able to take a train load at one time.

Q. Would it afford the operators the opportunity to ship coal from Lehigh in train load lots to the ends of freight divisions in this state? For instance, and to illustrate, from Lehigh to Mandan?

Mr. WATSON: Objected to as irrelevant and immaterial.

A. My belief is that it would.

Q. Do you think it would also result in the shipment of train loads as far east as Jamestown, North Dakota?

A. I believe that is quite possible.

Q. Do you know, Colonel, whether Mandan and Jamestown are freight divisions of the Northern Pacific Railway Company?

A. They are.

Q. From your investigation and knowledge of the lignite or native coals of this state, would you say that the deposit of coal is very vast and such as will furnish fuel for a large number of years to come, or is it a small deposit so that it doesn't amount to anything as a factor in this state?

Mr. WATSON: Objected to as irrelevant and immaterial.

A. Before I answer the question, I would like to ask whether you want my personal observation on that matter?

Q. I want your personal observations; also what you have learned in the way of research, and everything you know about the subject.

Mr. WATSON: Same objection.

Q. I have personally examined the coal fields in Ward county along the Soo line and those along the N. P. in Stark and Billings counties, and also those along the new line of the Chicago, Milwaukee & St. Paul in Bowman county. I have found a number of very large deposits of coal. In southern Billings county under my per-

sonal supervision three sections of land were drilled, showing a vein of some thirty to thirty-one and a half feet at twenty drill holes, scattered over three sections, all apparently available for mining. In Bowman county at Scranton, the open mine shows a vein nineteen feet in thickness, and that vein has been explored, the drillings extending a mile back from the opening of the mine. In Ward county the veins which are being mined range from six to eleven and a half feet in thickness and are of great extent. My conclusion, therefore, is that the fuel supply of lignite coal in North Dakota, available for mining, is so great as to be practically inexhaustible.

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Q. Will you state whether the industry of mining native coal in this state is in its mere infancy or has it been developed to any great extent?

A. My opinion is that the industry is in its infancy, and that the development of the state will cause a vast development in the mining of this fuel.

Q. When the lignite coal industry is properly developed, will the shipment of coal in this state constitute any considerable portion of the traffic of the railroads?

Mr. WATSON: Objected to as irrelevant and immaterial, the witness not being shown to be posted on the subject of what constitutes traffic of railroads.

A. I could not venture an estimate as to the proportion of the traffic which the lignite coal industry would supply the railroads. But, in my judgment, it would be a considerable portion of their local traffic.

Q. Are you acquainted with the rates which the railroad companies charge for shipment of the coal in this state as compared with the rates prescribed by the laws of 1907?

A. Not especially. I know the charge to many stations under the present rate, but have not figured the rate to the same stations under the law of 1907.

Q. In the shipment of coal from your mines, have the railroad companies shipped any of it at the rate provided for by chapter 51, laws of 1907?

A. Not to the best of my knowledge.

Q. Do they charge more or less than the rate provided for by the chapter above referred to?

A. Their tariff rate is higher than that provided for in the chapter referred to.

Cross-examination.

By Mr. WATSON:

Q. What is the name, Colonel Peake, of the company which operates the Lehigh mine?

A. The company which operates the Lehigh mines is a co-partnership consisting of Amasa F. Peake and John F. Brodie, and is called the Consolidated Coal Company.

Q. The Lehigh mine is on the main line of the Northern Pacific about five miles east of Dickinson?

A. Five miles east of Dickinson on the main line of the Northern Pacific.

115 Q. And the mine alluded to at Scranton is operated by the same company?

A. By the same company.

Q. And is on the new line of the Chicago, Milwaukee & St. Paul in Bowman county?

A. Bowman county, North Dakota.

Q. You stated in your direct testimony that the amount of coal mined from the Lehigh mine during the last year was about 45,000 tons?

A. I did.

Q. When does the year end, touching which you give this as having been the production?

A. It ends the first of January.

Q. You mean for the year ending Dec. 31st, 1908?

A. That would be the production for the year ending Dec. 31st, 1908.

Q. How does that compare with the production for the calendar year 1907?

A. It was slightly less.

Q. And how does it compare with the production for the calendar year 1906?

A. The production for the year—calendar year—1906, was much heavier on account of the snow blockade which caused a greater demand for lignite coal.

Q. Can you give us what the production of the Lehigh mine was for the calendar year 1906?

A. It was approximately 10,000 tons greater than this year.

Q. Is some of this production of the Lehigh mine hauled away in wagons?

A. A small proportion.

Q. What proportion of the 45,000 tons production during this year was thus marketed?

A. Not more than 2,000 tons.

Q. Is the coal which goes to Dickinson hauled by wagon or upon cars?

A. Largely by the railroad company on cars.

Q. How much of the 43,000 tons carried by the railroad company was hauled to Dickinson from your mine for local consumption?

A. For local consumption at Dickinson, I should estimate at least fifty per cent of the entire amount—about one-half of all the coal.

Q. About one-half of all the coal marketed by the railroads was hauled from your mine at Lehigh to Dickinson?

A. Yes, sir.

Q. Which was a haul by the railroads of about five miles?

A. Five miles.

Q. And the other balance of the output approximating about 21,000 tons would be shipped back to other points in the State of North Dakota?

A. I would say this is merely an estimate and has never been verified by our bookkeeper, but my estimate is that fifty per cent of our production is utilized at Dickinson by the brick plants and other power using concerns, and by the people locally, and the
115 other fifty per cent is hauled east and west from Dickinson by the Northern Pacific and used at stations along its line.

Q. The average carload of your coal is about twenty-five tons?

A. About twenty-five tons average per car.

Q. Approximately, then, I understand that the total output of your mine for the current year would be about 1,800 cars, assuming that 25 tons was the average size of the load?

A. It would.

Q. That would be an average, then, of about something less than five cars per day for the whole year?

A. It would average about five cars per day for the working days.

Q. The bulk of shipments you say are made in October and November?

A. Those two months are the months of heaviest shipments in ordinary years.

Q. Could you tell us what proportion of the 45,000 tons of output during the current year was mined and shipped during the months of October and November of this year?

A. Approximately 9,500 tons were shipped in October and November.

Q. About one-fifth of the year's output comes in those two months?

A. It does.

Q. The lignite coal, by reason of its nature, slacks badly when exposed for some time in the air?

A. When exposed for any length of time to the air the outside of the pile of coal slacks and forms a natural air-tight covering for the inner part of the pile. The loss from evaporation is very great in storing this coal.

Q. By reason of the fact that it is not practicable as a commercial proposition to accumulate large stores of coal during the summer season?

A. We do not consider it practical.

Q. And for the like reason buyers will not purchase and lay up large stores for future sales and consumption. Is that also true?

A. Retailers and the trade in general refuse to make purchases ahead for the reason stated in the question.

Q. What was your daily average output in tons during the months of October and November of the present year?

A. During the working days of the month the average output was approximately 250 tons per day.

Q. That would be about ten carloads per day?

A. About ten carloads per day. I would qualify that by stating that various considerations lead to the cutting down of working days to an average of less than six days per week.

Q. Well, the information I desired was as to the actual output upon each of the working days?

A. That was the output for working days.

117 —. And the machinery and appliances for taking out coal were worked up to their limit during that period?

A. They were not. They were worked up to the limit of men we were able to get for this rush of business. The appliances were sufficient to have taken out twice the amount of coal mined if we had been able to secure the miners just at the time they were needed.

Q. But you have already stated you were able to supply the demand for coal during those months?

A. We were able to supply the demand we had during those months this year.

Q. About ten cars per day is about the highest output your mine at Lehigh has ever put out, is it?

A. That is true with the exception of the year of the hard coal strike, when by special endeavor and the large number of drifting miners caused by that strike, we exceeded that output considerably.

Q. What was the output last year of your mine at Scranton?

A. I am unable to state the output of the Scranton mine. It was only opened last September. The railroad didn't reach it until the latter part of November, and I have no data giving the output, as the business was in a formative shape, a large amount of the coal mined during the development of the property being sold to the farmers of the vicinity and comparatively little being shipped.

Q. You have a railroad connection with the Chicago, Milwaukee & St. Paul?

A. We secured a railroad connection with the Chicago, Milwaukee & St. Paul about the first of January, 1908, and now have spur tracks leading directly to the tipples at the mines.

Q. Is there any considerable demand for lignite coal during the summer months in North Dakota, Colonel Peake?

A. The only demand outside of the local trade caused by the demand for lignite as a household fuel is that of the brick plants along the line of the Northern Pacific at Hebron and Dickinson and the demand for electric light and milling concerns, which is always lighter in the summer than in the fall and winter. That is the last two items.

Q. I suppose the brick plants do not operate in the winter season?

A. They operate until the first of December ordinarily. From about the first of May.

Mr. WATSON: That is all.

Redirect examination.

By Mr. MCCUE:

Q. Do you ship any coal over the Northern Pacific to points where they connect with other roads?

118 A. I don't understand that question. Do you wish to make the question to cover the shipments over the other roads?

Q. Yes, that is to say, *to say*, do you ship coal to any point where you would have to ship over the Northern Pacific part of the way and over the Great Northern or Soo the other portion?

A. We do not. There may possibly be one or two cars a year, but I could not give definite information. We do not solicit business on these other lines. We have found it unsatisfactory.

Q. Unsatisfactory? From what source?

A. From the delays in making the shipments; that is, in the shipments reaching the points, and from the rates charged for the shipment.

Q. Then the rates charged where they ship over the Northern Pacific; then over the Soo—would the rate be fixed by the chapter 51, laws of 1907, or do they charge two rates?

A. They have never issued a tariff sheet in accordance with the law of 1907. We have never received any information which would lead us to believe they would carry coal at that rate.

Q. Then they do actually charge two rates for shipments of coal over these lines?

A. They charge a higher rate than where coal is shipped continuously over one line.

Q. And that is one reason why you do not ship to points in the state where you would have to ship over the Northern Pacific and a connecting line?

A. It makes it impossible for us to compete with coal operators on the lines mentioned off the line of the Northern Pacific railroad.

Q. And that is principally on account of the rate charged?

A. Yes, sir.

P. J. CAHILL, a witness produced on behalf of the relator, being first duly sworn, testified as follows:

Redirect examination.

By Mr. McCUE:

Q. What is your name?

A. P. J. Cahill.

Q. Where do you reside, Mr. Cahill?

A. Wilton, North Dakota.

Q. How long have you resided there?

A. Since June 1, 1907.

Q. What business are you engaged in at that point?

A. Auditor of the Washburn Lignite Coal Company.

Q. As auditor of the Washburn Lignite Coal Company, you may state what your duties are?

A. I have charge of the accounts and statistics of the office and other general work that I may be asked to do.

Q. Your entire services and work is connected with that of handling and operating the coal business?

A. Yes, sir.

119 Q. Where are the mines of your company located?

A. They are located at Chapin, Burleigh county.

Q. What line of railroad are they on?

A. On the Soo line.

Q. Does your company operate more than one mine?

A. No, they operate but one mine at present. They have, however, a mine called No. 2. The shaft has been put down, but no mining has been done.

Q. How long has this Washburn Coal Company operated in the coal business?

A. That is a question I had not anticipated. I do not know. I have been with them more or less for the past four years, and I believe they have operated since 1896, or probably sooner. That question I can't answer.

Q. You have been engaged with them for the last four years?

A. Off and on.

Q. You may state what the character of the mine is at Chapin with reference to the quality of the coal apparently in sight?

Mr. WATSON: Objected to as irrelevant and immaterial, not bearing upon any of the issues of this suit.

A. I don't know that. They figure they have a quantity of coal that would last to exceed 150 years at the present output.

Q. What is the depth of the vein?

A. Do you have reference to the mine now operated or the two?

Q. I meant the properties of your company?

A. I know the new one will exceed the first one.

Q. And what is the depth of the vein in the mine now operated?

A. The vein runs eight to sixteen feet. The average depth is probably twelve or thirteen feet.

Q. And do you know whether this has been prospected over any considerable portion of the surface in that vicinity?

A. I do not know to what extent it has been prospected. I can not give it off-hand.

Q. Is it a very large deposit, or is it a medium proposition?

A. It is a very large deposit.

Q. About how many tons or carloads of coal has been taken out of the mine at Chapin last year?

A. About 110,000 to 112,000 tons to the end of the present year. That is what we figure it would be to January 1st.

Q. Would your company be able to supply the demand for lignite coal?

A. During the present year they have for the first time. That is in the fall of the year and the latter part of the summer. They have never been able to supply the demand until this year.

Q. Is the coal from your mine shipped in just carload lots or do you ship it in train loads?

A. During the past three months we have shipped practically train load lots, considering that a train was thirty cars.

120 Q. State to what points in the State of North Dakota your company shipped coal?

A. To what points?

Q. Yes.

A. We shipped to Fargo, Oakes, Fairmount. We have shipped

as far as Tolley, N. Dak., Minot, Leeds. We have shipped to Grafton. We have shipped to Page on the Great Northern. Those are extreme points.

Q. And the shipments from the Washburn mines to Fargo, you may state what lines of road they go over.

A. They go over the Soo line and Milwaukee. The junction point is at Fairmount. They go over the Soo line to Fairmount and from Fairmount to Fargo over the Milwaukee, as a rule. A few shipments, however, go by way of Bismarck and over the Northern Pacific.

Q. Shipments to Leeds?

A. Would be over the Soo to Bismarck, and from Bismarck to Leeds over the N. P.

Q. To Page?

A. Over the Soo to Bismarck. Over the N. P. to Casselton. From Casselton over the Great Northern.

Q. Are you acquainted with the rates that the roads charge for shipments of coal over those connecting lines which you have referred to and stated? That is, do they charge a continuous rate?

A. They charge a combination of local rates. It amounts practically to local rates. For instance, to Page, to the amount of three local rates. We have no interchangeable tariffs.

Q. And what, about, is the distance from the mines to Bismarck by way of the Soo?

A. I believe twenty-seven miles.

Q. Do you know about what is the distance from Bismarck to Fairmount approximately?

A. I should judge it was two hundred miles. That is approximately. I am not acquainted with the exact distance.

Q. Can you tell us what the effect would be on the consumption and demand of coal if the railway companies would ship coal from the mines to the points named at the tariff rates prescribed in chapter 51, laws of 1907.

Mr. WATSON: Objected to as irrelevant and immaterial.

Q. Would it greatly increase the demand or not?

A. Now, there are a few of those points where we come into competition with the other mines. That has a certain bearing. However, disregarding that, it would greatly increase the demand for coal at those points. In fact, I should think it would more than double it.

Q. Do you ship considerable coal from the mines to freight division points on the Northern Pacific railroad?

A. You mean for consumption?

Q. For out-shipment, consumption and otherwise?

Mr. WATSON: Objected to as irrelevant and immaterial.

121 Q. You mean from the junction points to various points on that line? For instance, ship from Bismarck and on over the N. P.

—. You mean considerable proportion?

Q. Considerable as far as the division points, Jamestown or Mandan, and division points on the Soo.

Mr. WATSON: Objected to as irrelevant and immaterial.

A. There is considerable of their output goes to division points.

Q. Then the haul would be practically over the entire freight division, such as if you ship to Jamestown? That is, the coal which you ship from your mine to Bismarck and from Bismarck to Jamestown would go over practically one entire freight division, the freight division being from Mandan to Jamestown?

A. Yes.

Q. And Bismarck is located five miles east of Mandan?

A. Yes, sir; 5.7, I believe.

Q. The coal which you ship on the Soo to the Milwaukee is shipped over an entire freight division, is it not, on the Soo line?

A. It is.

Q. If the railroad companies put in force the tariff provided for by chapter 51, laws of 1907, would that enable you to ship any considerable quantity of coal in train load lots?

A. Well, yes. To the next division point, you mean?

Q. Yes.

A. It would.

Q. What effect does the fact that the railway companies charge a higher rate than that prescribed by chapter 51, laws of 1907, have upon the consumption of coal and the demand for lignite coal?

Mr. WATSON: Objected to as irrelevant and immaterial.

A. It has the effect that eastern coal substitutes or rather takes the place of lignite coal in a considerable proportion of the state and reduces very largely the output of lignite coal.

Q. And would you also say that of the demand for lignite coal?

A. The demand for lignite coal?

A. The demand for lignite coal?

—. Yes. This is especially so where the coal goes over more than one line of railway.

Q. Are you acquainted with any of the other coal fields and coal deposits in the state than those you have mentioned thus far in your testimony?

A. I am not, personally.

Cross-examination.

By Mr. WATSON:

Q. Mr. Cahill, you estimate the total output of the mine of the Washburn Lignite Coal Company for the current year at one hundred ten to one hundred twelve thousand tons?

A. Yes, sir.

122 Q. What was the output for the current year 1907 of the same mine?

A. 119,000 tons.

. Then your output for this year will be smaller than for 1907?

A. It will.

Q. The rates which you have paid the railroads for the transportation of your coal have been the same in 1908 that they were in 1907, have they not?

A. With the exception of Aberdeen, South Dakota.

Q. Has the loss of traffic for Aberdeen, South Dakota, entered into the diminution of your production for the current year to any material extent?

A. To the extent of about 600 tons.

Q. Then the balance of the loss of output in your mine of some 7,000 tons has been due to other causes?

A. It has.

Q. And this cannot be explained upon the basis of the railroad rates having anything to do with it, can it?

A. It cannot be explained by the relative rates charged in 1907 and 1908.

Q. And your belief that the lowering of rates on lignite coal would largely increase both the demand and consumption of such coal is, of course, based on the assumption that the mining companies would give to the users of lignite coal the entire benefit of any reduction in transportation charges, is it not?

A. Yes, sir.

Q. Of course, there would be no reason or necessity for the mine operators to do that unless they chose to do it, would there?

A. None that I know of.

Q. Is the bulk of our output during the months of October, November and December?

A. Nearly half.

Q. Then about one-half of your output would be shipped out over the roads during those three months of the year and the remaining fifty per cent would be scattered over the remaining months?

A. I would like to give that a different ratio. Forty-five per cent during those three months and fifty-five per cent the balance of the year. That would be nearer the proportion.

Q. You say that the mine has been averaging about thirty cars per day for the past two months?

A. We have. They have been hauled in about thirty-car lots.

Q. Do you mean that the railroads have been offered and have actually hauled on an average thirty cars of coal per day from your mine?

A. No, I don't mean that. I mean that they arranged to haul when they had that many cars.

Q. Well, about how often will they receive a train of thirty cars of coal from your mine?

A. Nearly every day, as a matter of fact. The average output is twenty-seven cars. That would leave three cars every so often.

123 Q. Now, that amount of coal goes down to Bismarck in a separate trainload, does it, or in connection with other freight hauled in the same train?

A. That depends upon the convenience of the railroad company.

If they have merchandise, ten or twelve cars, they add so many cars of coal. I believe the average train is thirty cars to Bismarck. That is what they figure on hauling. They have arranged their trains so that they have always had thirty cars for the past two months.

Q. Then from Bismarck the coal is distributed, part going east on the Northern Pacific and part south on the Soo and part west on the Northern Pacific. That is true, is it not?

A. Yes, sir.

Q. Then there wouldn't be trainload lots beyond Bismarck, would there?

A. Not at the present time, no. I might add, however, that to suit the convenience of the railroad company those cars are held at Bismarck irregardless—I might say regardless—of the time in transit. They are sometimes held to the extent of holding fifteen or twenty cars there for them to haul in a bunch, whereas we bill them out from day to day in smaller proportion.

Q. I suppose, however, that is the exception? That as a rule shipments of less than trainload lots are put into the local trains and carried the same as other freight.

A. During the summer months we have considerable trouble in getting our coal to destination daily. That is, promptly.

DAVID J. LLOYD, a witness produced on behalf of the relator, being first duly sworn, testified as follows:

Direct examination:

By Mr. McCUE:

Q. What is your name?
A. David J. Lloyd.
Q. And where do you reside?
A. At Burlington and Minot.
Q. What are you engaged in?
A. In mining coal.
Q. How long have you been engaged in mining coal?
A. For ten years.
Q. Where are your mines located?
A. I have one located at a point three miles northwest of Burlington and another one a mile southeast of Foxholm.
Q. You have been engaged in the mining, handling and shipping of coal for the last ten years in this state, have you?
A. Yes, sir.
Q. From what points named?
A. Well, from the point that used to be called Paradise; it is now called Lloyd. There is a spur and I have been loading there for ten years. At Foxholm I took possession the 21st of October last.

124 Q. Are you acquainted with the amount of coal deposits in the vicinity of Burlington and places where you have operated?

A. Yes, sir.

Q. You may state what the amount of coal is. Give us an idea of the quantity?

A. The veins where I am acquainted—I am acquainted some between Burlington and Kenmare—and the veins vary very much in size. There are places where it is much too small to mine. Where they mine it varies from three to eleven feet. Well, in fact, I don't know of any larger than the vein I have. That is about ten feet. One mine is about ten feet and the other nine.

Q. The one at Burlington about ten feet?

A. Yes, sir.

Q. And how much surface or territory does that coal-bearing strata cover?

A. Well, take it all the way from Burlington to Kenmare, it is mined all along the Soo railroad.

Q. That is how far?

A. About 45 miles. I think it goes beyond as far as Bowbells, about 60 miles, I guess, from Minot.

Q. Is that country all underlaid with lignite?

A. Well, not all. There are places where there isn't.

Q. But that country is generally a coal-bearing country, is it not?

A. Yes.

Q. And what would you say about the valuation of the deposits?

A. Well, I think the same as Colonel Peake. There is a big percentage that can't be mined successfully on account of poor roof and other places on account of too much slack to handle.

Q. What would you say about the amount that is capable of being mined, and what you would consider a merchantable proposition? What would you say about the amount?

A. Well, I think it is unlimited. We find that it crops out along the Soo line along the Mouse and Des Lacs rivers. That is, it is nearer the surface than further west. We find it dips from 23 to 40 feet to the mile, and the further west we go the deeper it is. Now, at my place there is 150 feet of covering over the coal, and at Des Lacs, where there was a place prospected, that I think was about 160 feet. That is between three and four miles west of it.

Q. Is coal better where it is deep or shallow?

A. I don't think that it makes much difference. Outcroppings and shallow covering isn't much good. There isn't much of that. It runs from fifty to one hundred and fifty feet.

Q. About how many tons of lignite coal do you mine in the year?

A. Well, I have been mining about 10,000 tons in the last eight years. I am located off the track, and I haven't crowded any on account of expecting to put in a spur.

125 Q. Do you know anything about the other mines in the vicinity of Kenmare?

A. Yes.

Q. What can you say about the quantity of coal mined?

A. The McClure Coal Company mines about four or five cars per day during three or four months of the fall.

Q. To what points do you ship in the state?

A. Well, I ship all along the Soo—that is, the most of my coal I ship along the Soo between Burlington and Valley City. I ship quite a good deal over the Great Northern.

Q. What points on the Great Northern have you shipped to?

A. Well, I couldn't give you all that. To Surrey, Rugby, Churchs Ferry, Devils Lake and Bottineau, and along those different towns; that is, some; not but very little. As a general thing we are bothered with cars. We can't get Great Northern cars to ship over that road and the Soo during the shipping season are hauling grain while coal is in demand, and the Soo will not allow their cars to go over the Great Northern Railroad at that time, so we are unable to get cars to ship over the Great Northern.

Q. Do you know anything about rates they charge over the Great Northern?

A. Well, I don't know. I couldn't give any exact figures, only to some points—to Surrey.

Mr. WATSON: Objected to as irrelevant, the published tariff rates being the best evidence.

Q. Have you any evidence?

A. I have a couple of freight bills to Surrey.

Here Exhibits 1 and 2 were offered and received in evidence.

Q. I show you Exhibits 1 and 2, and will ask you to state if these exhibits contain the freight charges which you paid for the shipment of the coal described in each exhibit?

A. Well, these are bills that the Bond Lumber Company paid freight on. Coal that I shipped to them and they paid the freight.

Mr. WATSON: I just want to ask you a question or two. You didn't pay these yourself, Mr. Lloyd?

A. No, sir.

Q. All you know is that you shipped some coal to the Bond Lumber Company at Surrey, N. Dak., and you have received from that company the two exhibits in question?

A. Yes, sir.

Q. And that is all you know about whether they relate to the particular shipments in question or as to the amount of tariff charged or paid for such shipments?

A. That is all I know, only what they told me.

Mr. WATSON: We object to the exhibits on the ground that the witness possesses no informations to the sums in question having been in fact paid and for that reason the exhibits are incompetent, irrelevant and immaterial.

126 Direct examination.

Continued by Mr. MCCUE:

Q. Do you know, Mr. Lloyd, whether or not the rate that is stated in the Exhibits 1 and 2 is the rate charged by the Great Northern and Soo railways for the shipment of coal to the points indicated in Exhibits 1 and 2?

Mr. WATSON: I object to that for the reason that the printed tariffs themselves are the best evidence of the charges made by defendant railroad companies.

Q. Do you know, Mr. Lloyd, whether or not the railroad companies charge more than the rate prescribed by chapter 51, laws of 1907, for the shipment of coal in the State of North Dakota?

A. No, I don't know as I have read the law. If I did I don't remember what the rates are.

Q. Do you know whether or not they charge two local rates where you ship over connecting lines?

A. Yes, sir.

Q. Do they?

A. Yes, sir.

Q. And what effect has that upon the demand for coal and the sale of coal?

Mr. WATSON: Objected to as irrelevant and immaterial.

A. It makes the price so high that it comes in competition with eastern coal, and they claim eastern coal is cheaper than the lignite is.

Q. Does that greatly reduce the demand for lignite coal?

A. Well, it hasn't with me very much, because I haven't had any trouble—well, it would, too, where it is used in mills and certain places such as light plants and water plants.

Q. Have you any knowledge of about how much coal the other operators mine in the vicinity of Kenmare and other places where coal is mined in Ward county?

A. No, I wouldn't have but a rough guess. I wouldn't care to make an estimate.

Q. Would you say it was larger than the amount you mine, or smaller?

A. Well, most of them mine less than I do. There are probably about three or four mines that have about the same as I do. I am figuring on just this one mine. I am not figuring on the Foxholm mine. I can put out more coal there than we all mine at present.

Q. What sort of a mine is this at Foxholm?

A. A nine-foot vein. I am going to have a spur.

Q. How many tons are you mining there per day?

A. Well, the output is more every day. When I took charge the tracks were mostly wooden tracks. I have had some steel rails put in. The cars were half ton cars, and I am selling these and getting ton cars, and we are putting those on and getting more on.
127 The output the day I left was sixty-five tons, but it is in shape, or soon will be, and there ought to be 150 tons per day without crowding it hard.

Q. What, in your judgment, is the reason that lignite coal is not mined in this state more than it is?

Mr. WATSON: Objected to as irrelevant and immaterial.

A. On account of coming in competition with eastern coal.

Q. And that on account of the freight rates?

A. Yes, sir, making the price of lignite coal high.

Q. If the companies would put in force the rate prescribed by chapter 51, laws of 1907, do you think the business would develop sufficiently at Foxholm to enable you to ship your coal in trainload lots?

A. No, I would not be able to do that. I couldn't do it. In the first place my spur wouldn't hold a trainload of cars.

Q. You could build a larger spur?

A. Well, I might. I probably would from both places. The two spurs are about six miles apart.

Q. Well, you could extend your spurs around so that it would contain a trainload of cars at a time.

A. Yes, but I wouldn't say that I would be able to ship in trainloads.

Cross-examination.

By Mr. WATSON:

Q. I understand, Mr. Lloyd, you have been operating a mine at Burlington for about ten years?

A. Yes, sir.

Q. That is on the Soo road?

A. Yes, sir.

Q. Northwest of Minot?

A. Yes, sir.

Q. What did I understand you to say about the production of 10,000 tons? Is that your annual production?

A. Yes, sir; annual production.

Q. For how many years has your production from the Burlington mine averaged 10,000 tons?

A. Well, it has been about the same for the last seven or eight years.

Q. Was it as great seven years ago as now?

A. Well, the demand wasn't so great, but I haven't been putting out more coal because I was expecting to put in a spur, and so I hadn't been crowding.

Q. You have to market all your coal by hauling it in wagons from the mines to the railroad siding?

A. Yes, sir.

Q. How far is that?

A. About a mile.

Q. Are the bulk of your sales also in October, November and December?

A. I find my sales about as good in September. Trade picks up about the middle of August for me, and for that reason I don't fill my orders anywhere near during the months of October, November and December. But I can during August and September, so I put out about the same these two months. The bulk of my ship-
128 ments are made from the middle of August to December. It depends on the year. Some years trade holds up to the first of May. I have kept four or five teams hauling. Put them on in August and kept them on until May.

Q. You mentioned railroad rates as being in your opinion the

reason why there wasn't a larger demand for and a larger consumption of lignite?

A. Well, now, I tell you. I don't know that it makes much difference in my trade. It does some, I think, though, it does in all shipments of lignite coal. It puts prices of lignite up so high people won't use lignite.

Q. Doesn't the inferior quality of lignite have something to do with that?

A. That is taking into comparison the quantity of different coals.

Q. Of course if lignite coal possessed the same fuel value that the eastern bituminous coal possesses, you wouldn't have any trouble in very largely increasing your sale of lignite coal in this state, even under existing rates, would you?

A. Oh, no.

Q. And the inherent difficulty that you have to contend with as a miner of coal is the fact that your product doesn't possess the same value as fuel that the coals that come in competition with you possess? Isn't that true?

A. Yes, sir.

Q. These other mines that you mentioned in your testimony in chief as producing and shipping four or five tons per day during the fall are located on the Soo also, are they not?

A. Yes, sir. Two miles north.

Q. Two miles north of your Burlington mine?

A. Yes, sir.

Q. Well, are there any lignite coal mines located on the line of the Great Northern railroad in Ward county?

A. There is, west of Minot. White Earth is the first.

Q. However, mining lignite coal along the lines of the Great Northern is a very small industry, is it not?

A. Yes, sir.

Q. The bulk of the mining is done on the Soo railroad in your country?

A. Yes, sir.

Both sides rest.

129 On the 20th day of January, 1909, the following stipulation was filed:

Stipulation.

In Supreme Court, State of North Dakota, ss.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

It is hereby stipulated by and between the Attorney General, representing the state, and Messrs. Ball, Watson, Young & Lawrence, representing the North Pacific Railway Company, the Great Northern

Railway Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, that the printed record of the pleadings, stipulations, evidence and exhibits in the case now pending before the court may be deemed and taken to be the complete record in each of the three cases, viz: State v. Northern Pacific, State v. Soo and State v. Great Northern, and the testimony of each witness and the exhibits may be considered in each case so far as applicable thereto; that the same may be received and treated as being the complete record without any further attestation or return on the part of the referee.

Dated January 2, 1909.

T. F. McCUE, *Attorney General.*
BALL, WATSON, YOUNG & LAWRENCE.
C. J. MURPHY,
C. W. BUNN AND
A. H. BRIGHT, *Attorneys for Defendants.*

Return of Great Northern Railway.

In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Now comes the defendant above named in response to the order to show cause of this court issued August 7, 1907, and returnable on the 16th day of September, 1907, at 10 A. M., which order
130 directs the defendant to show cause why the Attorney General of the State of North Dakota should not be permitted to file his petition herein and why this court should not take jurisdiction and issue its writ to enjoin this defendant from charging a higher rate for the transportation of coal than that prescribed by Chapter 51, Laws of 1907, which order was subsequently extended and this defendant permitted to make return at this time, and sets forth the following reasons in opposition to the application of the plaintiff, to-wit:

This defendant states that said petition should not be granted for the reason that the act referred to is void in that it violates the commerce clause of the Constitution of the United States, being Article 1, Section 8 which provides that Congress shall have authority and power to regulate commerce among the several states of the United States; and the act referred to is an attempt and if observed or enforced would have the effect to regulate and control interstate railway rates between the state of North Dakota and other states, and would nullify the laws of the Congress of the United States and the regulations and rules of interstate commerce adopted pursuant to the laws of the United States.

That said act is void in that the maximum rate fixed therein is unremunerative, unreasonable, inadequate and confiscatory, and violates the 14th amendment of the Federal Constitution and also section 13 of the Constitution of the State of North Dakota.

Therefore this defendant says that no grounds exist for the intervention of this court because the law referred to in the application herein is a nullity.

In this behalf defendant further states that if, in the opinion of this court, the said application should not be dismissed on the grounds hereinbefore stated then defendant is ready, willing and anxious to have this court entertain jurisdiction of this cause to the end that the same may be speedily submitted and determined upon the merits involved herein.

Dated this 26th day of September, 1907.

W. R. BEGG,
MURPHY & DUGGAN,
Attorneys for Defendant.

131 *Return of Minneapolis, St. Paul & Sault Ste. Marie Railway.*

In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General,
Plaintiff,
vs.
MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY,
Defendant.

Now comes the defendant above named and in response to the order of this Court, dated August 7, 1907, directing it to show cause before this court at the city of Grand Forks on September 16, 1907, at ten o'clock a. m., why leave should not be granted to the Attorney General of this state to file his petition herein and why this court should not take jurisdiction and issue its writ to enjoin this defendant from charging a higher rate for the transportation of coal than that fixed by Chapter 51, Laws of 1907, "Popular Edition" of Laws, page 274, and in pursuance of such order and its further order extending the time for making its return for a period of ten days, sets forth its grounds and reasons for not complying with said act of the legislature and its reasons why this court should not take jurisdiction or issue its writ as follows, towit: That the statute above referred to which the Attorney General seeks to enforce and which purports to forbid the charging of a higher rate for transporting coal than that fixed therein, is void, and for the following reasons:

1. Said act is void for the reason that it violates the commerce clause of the Constitution of the United States, Article 1, Section 8, which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."

2. Said act is void in this, that the maximum rate fixed therein is unremunerative, unreasonable, inadequate and confiscatory, and violates the fourteenth amendment to the Federal Constitution and also section 13 of the State Constitution.

In support of the statement of fact contained in the second subdivision of this return, and for the purpose of aiding this court in determining the preliminary question as to whether there is any

occasion for this court to take jurisdiction and for issuing its prerogative writ of injunction against the charging of a higher rate than
that fixed in said act, this defendant alleges and states that
132 the maximum rates for carrying coal which the defendant is allowed to charge under the act in question are greatly lower than the rates for similar service fixed by the legislature of the State of Minnesota for that state, and fixed by the railroad commissioners of Illinois for that state and by the railroad commissioners of Iowa for the State of Iowa; that the conditions existing in this state make it impossible to transport coal at a less rate than in the states named. For the purposes of comparison the defendant herewith sets forth the rates proposed for this state and the rates fixed in the states of Minnesota, Illinois and Iowa, as follows:

Miles.	North Dakota statutory rate.	Iowa rate.	Illinois rate.	Minnesota rate.
25	40	46	54	54
50	47	66	76	62
75	55	85	85	72
100	62	100	90	82
200	97	130	110	116
300	120	150	126	154

In proof of, and in support of, the statement that the rates in the states named are as above stated, this court is respectfully requested to take judicial notice of the rates fixed for the State of Minnesota by chapter 232, laws of 1907, of that state; also of the orders of the Iowa and Illinois railroad commissioners fixing the rates for those states, and defendant offers to produce such books and documents fixing such rates if this court shall so direct.

For the foregoing reasons it is respectfully urged that there is no warrant for judicial interference or for the issuance of a writ of injunction out of this court forbidding this defendant from charging a higher rate than that fixed by the act of the legislature in question.

ALFRED H. BRIGHT,
BALL, WATSON, YOUNG & HARDY,
Attorneys for Defendant.

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135 In the Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Stipulation.

It appearing that the original petition, motion, order to show cause, defendant's return, referee's oath and return and transcript of testimony herein have been mislaid and cannot be found; and it appearing further that the printed record thereof was made and used by consent in lieu of the originals of said records, evidence and proceedings, same consisting of one hundred and thirty-four pages, and termed a "Consolidated Record," and that the same is in all respects true and correct, it is therefore stipulated and agreed by and between the parties hereto, through their respective attorneys, that said "Consolidated Record" so taken and printed may be filed with the clerk of the Supreme Court and have the same force and effect in all things as the originals, and may be and shall be filed and accepted in lieu of the originals and with the same force and effect.

Dated this 11th day of May, 1909.

ANDREW MILLER & T. F. McCUE,
Attorneys for Plaintiff
C. W. BUNN & BALL, WATSON, YOUNG & LAWRENCE,
Attorneys for Defendant.

136 Thereafter, and on the 16th day of April, 1909, after due consideration of the issues raised herein the court directed the entry of the following order:

File No. 1625.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Ordered, That the writ of injunction as prayed for by the plaintiff herein do issue, and the clerk of this court is directed to forthwith issue the same, with costs of these proceedings to be taxed by the clerk of this court against the defendant herein and in favor of the plaintiff.

Thereafter, on the 16th day of April, 1909, the court filed the following opinion:

1. "Chapter 51, Laws of 1907, amending and re-enacting Section 1395, Revised Codes of 1905, prescribing maximum coal rates for the transportation by common carriers of coal in carload lots within the state is not violative of Article 1, Section 8 of the Constitution of the United States, known as the Commerce Clause, which confers upon congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" nor does it violate the 14th Amendment of the Federal constitution nor Section 13 of the Constitution of North Dakota providing, in effect, that no person shall be deprived of life, liberty or property without due process of law.

2. The legislative assembly possesses the undoubted power, under Section 142 of the Constitution of North Dakota, to prescribe maximum rates for the transportation by common carriers of commodities between points within the state, provided the rates thus prescribed are reasonable.

3. The act in question is presumptively valid and the burden is upon the carrier to prove that the rates therein prescribed are clearly unreasonable.

4. Where the constitutionality of a law is made to depend upon the existence or non-existence of some fact or state of facts the determination thereof is primarily for the legislature and the courts will acquiesce in its decision unless it clearly appears that such decision was erroneous.

5. Evidence examined, and held not sufficient to overcome the prima facie presumption that the rates prescribed by said act are reasonable.

6. The proper test as to whether the rates thus fixed are reasonable or unreasonable is not whether the rate fixed on the particular commodity is sufficiently high to enable the carrier to earn a fair compensation after allowing for the legitimate cost to the carrier of transporting the same, but whether, under such rates, it will be enabled from its total freight receipts on all its intra-state traffic to earn a sum above operating expenses reasonably necessary for such traffic sufficient to yield a fair and reasonable profit upon its investment. It is within the power of the legislature

to reduce the freight on a particular article, provided the carriers are enabled to earn a fair profit upon their entire intra-state business.

(Syllabus by the Court.)

Application for an original writ of injunction.

Writ granted.

FISK, J. By Chapter 51, Laws of 1907, which became effective July 1, 1907, the legislative assembly of this state amended and reenacted Section 1395, Revised Codes of 1905, which establishes maximum coal rates for the transportation by common carriers of carload lots of coal within the state. It is conceded that this statute has at all times been wholly ignored by the defendant and other carriers of freight in this state by their charging and exacting for such service higher rates than those prescribed therein, their contention being that said statute is unconstitutional and hence void for the reason, among others, that the rates thus prescribed are unreasonably low and confiscatory, and hence said act is violative of the 14th Amendment to the Federal Constitution, and Section 13 of the State Constitution. On August 7, 1907, the attorney general filed, by permission of this court, a petition, duly verified, in which are set forth the essential facts showing defendant's violation of said statute, and praying that this court issue its prerogative writ of injunction to restrain defendant, its agents and employés, from committing the acts complained of. Such petition is entitled in the name of the State of North Dakota, ex rel. T. F. McCue, Attorney General, as plaintiff, against Northern Pacific Railway Company as defendant. Similar proceedings in all respects were at said time also commenced against the Great Northern Railway Company and the Minneapolis, St. Paul and Sault Ste. Marie Railway Com-
138 pany. Pursuant to plaintiff's motion in that behalf an order to show cause, returnable on September 19th, was issued by the chief justice requiring defendant to appear and show cause, if any it had, why such writ should not issue permanently enjoining it from committing the acts complained of. In response to such order to show cause defendant made its return setting forth, in substance, that Chapter 51, Laws of 1907, aforesaid, is void for the reasons:

1. That it violates the Commerce Clause of the Constitution of the United States, Article I, Section 8, which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."

2. The maximum rate fixed by said act is "unremunerative, unreasonable, inadequate and confiscatory, and violates the 14th Amendment of the Federal Constitution, also Section 13 of the State Constitution." Such return also alleges that the maximum rates thus fixed by Chapter 51 are greatly in excess of corresponding rates as fixed by law in Minnesota and by the Railroad Commissioners in the states of Iowa and Illinois, and a comparison of the rates in these various states is set out therein.

By stipulation of counsel the clerk of this court was appointed referee for the purpose of taking and reporting to the court the testi-

mony offered by the respective parties upon the issues thus framed. On November 20, 1907, such referee duly qualified by taking the oath required by law and on the following 11th day of July, 1908, the taking of testimony was commenced at the general offices of defendant in the city of St. Paul, Minnesota, and was concluded on December 16, 1908, at Fargo, in this state, and the same was thereupon reported to the court, and on March 29, 1909, the cause was finally submitted for decision.

The Attorney General advances the following propositions:

1. The legislature has the right to regulate and fix rates for the transportation of coal in this state.

2. Presumptively, Chapter 51, Laws of 1907, is valid.

3. The burden of proving that the rates are unreasonable is upon the defendant.

4. The proposed rate is not unreasonable, even though it is not compensatory, provided the defendant is earning a fair profit upon its entire business in this state.

5. Chapter 51, Laws of 1907, in no way amounts to a regulation of interstate commerce.

The correctness of the first proposition is not challenged by defendant's counsel provided the same is qualified so as to restrict such right to the regulating and fixing of rates which are reasonable, and the attorney general concedes that it should be thus qualified. The rule is, of course, too well settled to admit of dispute that the legislature has the power to fix and regulate rates to be charged by common carriers upon intrastate traffic, provided such rates are not confiscatory but are reasonably remunerative. Section 142 of our constitution expressly confers such power upon the legislature. Upon the second and third propositions which are that the statute in question is presumptively valid and that the burden of proving that the rates therein fixed are unreasonable, is upon defendant, counsel for the railway company, while stating that these questions are not of controlling importance in view of the state of the proof, argues that such presumption does not obtain in this case and that the burden is upon the state to show that the rates fixed by said statute are reasonable. No authorities are cited in support of these contentions and we believe none exist. We know of no exception to the general rule that a statute is presumptively valid and will be upheld unless it clearly contravenes the organic law of the state or of the United States, or a valid statute or treaty thereof. This is so elementary as to require the citation of no authorities; but see Sutherland on Statutory Construction, page 417; 2 Lewis' Sutherland Statutory Construction, § 513; Sec. 207, [Ann. Stat. (1906)]; 36 Cyc. & Eng. Anno. Cases, 1105. From the opinion in the latter case we quote: "The presumption always is that an act of the legislature is constitutional, and when this depends on the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce in its decision unless the error clearly appears." Borland v. Hildreth, 26 Cal. 184; State Investment Co. v. Reed, 37 Cal. 652; Matter of Madera Irrigation Dist., 92 Cal. 310, 27 Am. St. Rep. 106;

28 Pac. Rep. 272, 675; Sinking Fund Cases, 99 U. S. 718; 1 Tiedeman on Police Power, 10, note; Cooley on Constitutional Limitations, (7th Ed.) 228. 'Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' Sinking Fund Cases, 99 U. S. 718. 'The delicate act of declaring an act of the legislature unconstitutional and void should never be exercised unless there is a clear repugnancy between the statute and the organic law. * * * In a doubtful case the benefit of the doubt is to be given to the legislature; but it is to be remembered that the doubt to which this rule of construction refers is a reasonable doubt as distinguished from vague conjecture or misgiving.' Bourland v. Hildreth, 26 Cal. 184.

This brings us to the main and controlling proposition in the case which involves the question of the reasonableness of the rates thus established. Does the evidence clearly show that such new rates, if enforced, will necessarily prevent the carrier from earning and receiving a fairly reasonable income upon its legitimate investment, or the present value of its property, after paying all necessary operating expenses? If so, the act cannot be sustained. The authorities to this effect are unanimous.

It is asserted by counsel for the defendant that the rates fixed by Chapter 51 would not even yield sufficient returns to defray the operating expenses alone, much less to pay a reasonable rate upon such investment. This assertion is predicated, however, upon two assumptions, neither of which are, in our opinion, warranted. Starting with the erroneous assumption that the act merely fixes rates for the transportation of lignite coal, counsel throughout the trial and [illegible] in their argument further assumed that the test as to the reasonableness of these rates is whether the freight receipts derived from hauling lignite coal between points in this state, are sufficient to pay, in addition to the operating expenses of this particular traffic, a reasonable compensation or profit. An examination of the act in question will serve to demonstrate the fallacy of the first assumption. Regarding the other assumption a more extended consideration is demanded.

For the purpose of showing the unreasonableness of the rates fixed will defendant be permitted to single out the one commodity to which the rates apply and prove, as it has attempted to do in this case, *that the transportation thereof is a losing proposition to the carrier?* Or must it not show that if such rates are enforced it will be unable from the total freight receipts to earn a sum above operating expenses sufficient to yield a fair and reasonable profit upon its investment, provided the road was economically and efficiently constructed and operated? It was conceded on oral argument by defendant's counsel, in effect, that under the latter test it has no defense. The proof shows that the lignite coal shipments form an infinitesimal portion of the entire freight shipments in the state and hence that the difference between the freight receipts based upon the

rates now charged and collected and those based upon the rates sought to be enforced, would not materially affect the total receipts from all freight shipments within the state. This being true, has defendant any valid ground for complaint against the act in question? In other words, does such act contravene either of the above cited provisions of the Federal and State Constitutions? As above stated, every presumption will be indulged in favor of the act, and hence it must be presumed that the legislature carefully considered the foregoing facts before enacting such rates. If it is permissible for defendant to adopt the test which it has adopted for determining the reasonableness of such rates, then upon the same reasoning it would be proper in order to show the inadequacy of rates generally, to prove that certain or all of its branch lines are unremunerative. This clearly could not be done. Interstate Commerce Commission,
142 118 Fed. 613; St. Louis Railway Company v. Gill, 156 U. S. 649, affirming same case in 54 Ark. 101, 11 L. R. A. 452.

In the latter case the United States Supreme Court, among other things, said: "It, therefore, appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety, even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway Company and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts, we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section or other part into which the road might be divided, nor attack, as unjust, a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participate; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas." Upon parity of reasoning it would seem that the carrier may not be permitted to single out one commodity and insist that the tariff of rates for the transportation of the same is unreasonable and confiscatory without being required to show that under the operation of such rates it will be unable to derive from its entire freight business within the state a just and reasonable profit. In an able article on "State Regulation of Railroad Rates and Charges," by Dean Bruce in 62 Central Law Journal, 158, it is, among other things, said: "Rates, however, are not necessarily unreasonable, nor is their enforcement a taking of property without due process of law, merely because, if such rates were applied to all freight, the road
143 would be operated at a loss. The tariff, therefore, for coal in carload lots and for similar products of general consumption

may, when such products make up but a comparatively small proportion of the general freight carried, be fixed at a comparatively low rate and one which, if generally applied to all products, would leave no profit to the company. So too, it has been held that the mere fact that a railway line operated as part of a large system does not by itself pay expenses, does not justify the charging of unreasonable rate in a shipment over such system.' Citing State v. Minneapolis & St. Louis R. Co., 83 N. W. (Minn.) 60; Minneapolis & St. Louis R. Co. v. State of Minnesota, 186 U. S. 257; Interstate Commerce Commission v. Louisville and N. R. Co., 118 Fed. 613. The Federal Supreme Court, in affirming the Minnesota court, held that it is not beyond the power of the commissioners of railroads to reduce the freight upon a particular article provided the Company is permitted to earn a fair profit upon the entire business, and that the burden of proof is upon the carrier to impeach the action of the commission. Among other things the court said: 'Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, we expressed the opinion that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to those points. The right to permit this to be done is expressly
144 reserved to the Interstate Commerce Commission by Section 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular. As we said in Smyth v. Ames: 'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.' * * * In exercising its power of supervising such rates the commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion

that the rate upon a particular article, or class or freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate."

Two cases very similar to the case at bar arose in the state of Florida as late as 1904. The railroad commission of that state fixed local rates for the transportation of phosphate which rates were ignored by the carriers. The state, through its attorney general, invoked the original jurisdiction of the Supreme Court for the issuance of a peremptory writ of mandamus to enforce the order of the commission fixing such rates. The respondents' return in those cases raised two issues for determination: 1. Whether
145 the rates sought to be enforced are in and of themselves unreasonable, and, 2. Whether said rates, taken in connection with the other rates enforced by the state railroad commission on local business, would deprive the railway of its property without due process of law, or deny to it the equal protection of the law within the inhibition of the Federal Constitution. It was held that the burden was upon the respondent to establish the affirmative of both of these propositions and that they failed to establish either. These cases are both entitled State v. Ellis and are reported in 48 Fla. 146 and 150. Both cases were taken by writ of error to the Federal Supreme Court and affirmed by unanimous decisions. See 203 U. S. 250 and 261.

In the light of the well settled rules above announced does the proof warrant this court in holding that these statutory rates are unreasonable and confiscatory and hence that the act establishing the same is unconstitutional and void? We are clear that this question must be answered in the negative. Defendant attempted to show the invalidity of such rates, first by a comparison of such rates with the rates in force in other states for the transportation of soft coal, and, second, by conclusions testified to by various witnesses to the effect that the cost of transporting lignite coal in this state is more than the freight receipts derived from such traffic. It would be a needless task to review this testimony at length. Suffice it to say that such proof comes far short of overcoming the prima facie presumption that such statutory rates are reasonable and valid. Regarding the comparison of the rates in other states with those fixed by the act in question we call attention to the language of the Minnesota court in State v. Minneapolis & St. Louis R. Co., 83 Minn. pp. 345, as follows: "Counsel for defendant claims something for testimony as to rates received by other roads for this class of service, and by comparison asserts that the tariff complained of is too low. This method of ascertaining the reasonableness of the tariff is valueless, because it may be that the other roads are exorbitant in their charges. That another road is receiving, say,

one dollar per ton for carrying coal one hundred miles,
146 while defendant receives but seventy-five cents for the same
distance, may prove that the other road charges too much,
and should be looked after by the commission; but this kind of
evidence does not demonstrate that defendant is receiving too little
and that the commission has fixed an unfair and unreasonable
tariff of rates on its line.' Also to the language of the Circuit Court
of the United States in Smyth v. Ames, 64 Fed. 165, and approved
by the Federal Supreme Court in 169 U. S. 540, as follows: 'Com-
parisons, therefore, between the rates of two states, are of little
value, unless all the elements that enter into the problem are pre-
sented.' Even if this character of evidence would be admissible
when a proper foundation has been laid for its introduction by
showing a similarity of conditions in the other states to those ex-
isting in this state, no such proof was offered. Furthermore, the
proof of the foreign rates consisted of certain copies of schedules
of such rates and from such copies, which are in no way authenti-
cated, defendant's Exhibit "4," which purports to be a comparison
of coal rates in various states, including North Dakota, was com-
piled by rate clerks in defendant's general offices. Not a scintilla
of proof is offered to show that such foreign rates are reasonable.
For these reasons such proof can be given no effect by this court.
Aside from the attempted proof of the unreasonableness of these
rates by comparison with rates in other states, defendant's proof
of such alleged unreasonableness consists merely of conclusions
testified to by various witnesses relative to the cost of transporting
lignite coal over its lines of road. As before stated, these con-
clusions are based upon the erroneous assumption that the new
rates relate merely to lignite coal shipments; but conceding that
such assumption is, in practical effect, accurate, there is no con-
tention made that under the operation of such rates, the defendant
will not be able upon its entire intra-state traffic to earn, in addition
to its gross operating expenses, a sum amply sufficient to yield a
reasonable income upon its investment. This being true defendant,
under the foregoing authorities, cannot successfully urge the un-
constitutionality of said law. Defendant's counsel contend however,
in effect, that each class of freight must be required to
147 bear its share necessary to insure to the carrier a reasonable
compensation for its service to the public. This argument,
in a qualified sense, is sound. It should, of course, be required to
bear its just and equitable burden but it is everywhere held proper
and just that freight commodities should be classified in fixing rates,
and that a reasonable rate for one class may be entirely unreasonable
as to another class, although both are identical as to bulk and
weight and the expense to the carrier is as great for the transporta-
tion of one as the other. What is a reasonable and equitable rate
for one commodity may be wholly unreasonable and inequitable as
to another. Coal, being a necessity and in general use by the public,
is, and justly should be favored in making up rate classifications
and schedules, and it is perfectly legitimate to permit the carrier,
in order to earn a reasonable compensation upon its entire intra-

state traffic, to charge and collect a high enough rate on general traffic to make up any deficiency caused by a lower rate on special commodities such as coal. Whether a rate on any special commodity which is so low as to entail a positive loss to the carrier in so far as the transportation of such particular commodity is concerned, is necessarily invalid, we are not here required to decide, as we consider the evidence insufficient, for reasons above stated, to disclose the existence of any such conditions. The Federal Supreme Court in Minneapolis & St. L. R. Co. v. Minnesota, supra, fully sustains us in these views. We again quote from the opinion: "* * * We do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular."

In the nature of things it is impossible to say with any degree of accuracy what the effect of the enforcement of such statutory rates will be and there can be no accurate test except the test of experience. The natural effect of cheaper rates will be to increase the demand for native coal all over the state and this may result in enabling the carrier to transport such article in trainload lots and hence at greatly decreased expense.

It is finally urged by defendant's counsel that the act in question violates the interstate commerce clause of the Federal Constitution. Their argument is necessarily predicated upon the assumption that state regulation of local rates on interstate lines amounts to an interference with interstate commerce, as the act assailed, upon its face, merely purports to establish maximum rates for transporting coal in carload lots between points within the state. This question is not open to debate as the court of last resort in this country has repeatedly held adversely to counsel's contention. See Louisville & N. R. Co. v. Kentucky, 183 U. S. 503 and cases cited. In that case the court, speaking through Mr. Justice Shiras, said: "The final contention, that Section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.

It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.

It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers

of a state. New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 439, 39 L. ed. 1043, 1045, 15 Sup. Ct. Rep. 896; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

149 A discussion of this subject will be found in the opinion of this court in Louisville & N. R. Co. v. Kentucky, 161 U. S. 701, 40 L. Ed. 659, 16 Sup. Ct. Rep. 714, where the same conclusion was reached."

It is but fair to counsel for defendant to state that they concede that up to this time the decisions of the United States Supreme Court on this point are uniformly opposed to their contention. Even if we were disposed to entertain the views expressed by Judge Lochren in Perkins v. N. P. Ry. Co., 155 Fed. at page 453, which we are not, we should feel it our duty, as did Judge Lochren, to yield to the judicial utterances of the final arbiter on this question.

The writ will issue as prayed for by plaintiff.

All concur."

(Signed) C. J. FISK.
D. E. MORGAN.
JOHN CARMODY.
S. E. ELLSWORTH.
B. F. SPALDING.

Pursuant to which decision on the 27th day of May, 1909, judgment was entered granting the writ of injunction and the relief prayed for in the plaintiff's petition.

Thereupon defendant tenders this, its bill of exceptions, to the action of the Court in the various particulars hereinbefore set out.

Order Allowing Bill.

Now, the matter of settling and allowing a bill of exceptions herein having been duly presented to the court, said court does now allow and settle the foregoing as the bill of exceptions herein, and the same is hereby made a part of the record in said case.

Dated this 27th day of May, A. D. 1909.

BURLEIGH F. SPALDING,
Presiding Judge of the Supreme Court of the State of North Dakota.

150

Final Judgment.

In the Supreme Court, State of North Dakota, *ss:*

File No. 1625.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Judgment.

The attorney general having filed his verified petition herein asking that a writ issue out of this court requiring and commanding the defendant to put in force the rates fixed by Chapter 51, Laws of 1907, and issue having been joined thereon by the serving and filing of defendant's answer thereto, and the testimony of both parties upon the issues thus joined having been taken before a referee and the same having been reported to this court for examination and consideration, in the form of an agreed record termed a "Consolidated Record," and said cause having been submitted by both parties upon said record, which contains all the evidence offered and proceedings taken herein, and the court having considered said evidence, the arguments and briefs of counsel, and having made and filed its written opinion sustaining the petition and the validity of said law and the right of the petitioner to the relief asked, Now, Therefore, in pursuance of such opinion, conclusions and order, It Is Hereby,

Ordered and adjudged, That said act, to-wit: Chapter 51, Laws of 1907, is valid and constitutional; that the petitioner is entitled to the relief asked and, further, that a writ issue herein requiring and commanding the defendant to put in force the rates prescribed in said act.

Dated this 27th day of May, A. D. 1909.

Witness the Hon. D. E. Morgan, Chief Justice of the Supreme Court of the State of North Dakota and my hand and the seal of said court the day and year above written.

[Seal of the Supreme Court of the State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court,
State of North Dakota.

The above judgment recorded at length in Minute and Judgment Book No. C, at Page numbered 333 this 27th day of May, A. D. 1909.

R. D. HOSKINS, *Clerk.*

For the purpose of permitting the defendant herein to apply to the Supreme Court of the United States for a writ of error and supersc-

deas bond herein, execution on the foregoing judgment is hereby stayed for thirty days from date hereof.

Dated May 27, 1909.

B. F. SPALDING,
Presiding Judge Supreme Court, N. D.

150*a* In Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Certificate of Clerk of Supreme Court to Transcript.

I, R. D. Hoskins, Clerk of the Supreme Court of the State of North Dakota, do hereby certify that the annexed, preceding and foregoing pages, consisting of typewritten page "O" and printed pages 1 to 134 and typewritten pages numbered 135 to 150, inclusive, contain and is a true and correct copy and transcript of the records of my office in the case of the State of North Dakota ex rel. v. Northern Pacific Railway Company, wherein judgment was rendered and entered against the defendant; that pages "O" to 150 inclusive, is a true copy of the bill of exceptions settled and filed on the 1st day of June, 1909; that the pleadings and orders contained in said bill of exceptions are true copies of the orders and pleadings upon which said cause was submitted; that the stipulation substituting the consolidated record are true copies of the originals; that pages 136*a* to 149 contain a true copy of the opinion of the court filed herein; that pages 136 and 150 contain and are true copies of the order for judgment and judgment herein and order staying proceedings; that at the times named herein the Hon. D. E. Morgan, chief justice of said Court, was ill and unable to sit; that Hon. B. F. Spalding sat in his stead as presiding judge under Section 92 of the State constitution.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of the State of North Dakota.

151 In Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Assignment of Errors.

Comes now the defendant and files the following assignment of errors upon which it will rely for its prosecution of the writ of error in the foregoing entitled cause:

I.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that Chapter 51, Laws of 1907, of the State of North Dakota, amending and reenacting Section 4395, Revised Code of 1905, prescribing maximum coal rates for the transportation by common carriers of coal in carload lots within the state, is not violative of Article 1, Section 8, of the Constitution of the United States, known as the Commerce Clause, which confers upon Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" and that said law does not violate the 14th Amendment of the Federal Constitution, (nor Section 13 of the Constitution of North Dakota) providing in effect that no person shall be deprived of life, liberty or property without due process of law.

II.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the act in question is presumptively valid
152 and the burden is upon the carrier to prove that the rates therein prescribed are clearly unreasonable.

III.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the evidence is not sufficient to overcome the prima facie presumption that the rates prescribed by said act are reasonable.

IV.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the proper test as to whether the rates thus fixed are reasonable or unreasonable is not whether the rate fixed on the particular commodity is sufficiently high to enable the carrier to earn a fair compensation after allowing for the legitimate cost to the carrier of transporting the same, but, whether, under such rates, it will be enabled from its total freight receipts on all its intra-state traffic to earn a sum above operating expenses reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit upon its investment; and that it is within the power of the legislature to reduce the freight on a particular article below a compensatory value provided the carriers are enabled to earn a fair profit upon their entire intra-state business.

V.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action,

wherein it was held that the rates prescribed by the law involved in this action are presumptably valid.

VI.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the test as to the reasonableness of the rates involved is not whether the freight receipts derived from hauling lig-
nite coal between points in the State of North Dakota are
153 sufficient to pay, in addition to the operating expenses of this particular traffic, a reasonable compensation or profit.

VII.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the defendant must show that the rates involved in this action will, when taken in connection with the total freight receipts for business in the State of North Dakota, be insufficient to earn a sum above operating expenses to yield a fair and reasonable profit upon the defendant's investment, providing the road of the defendant was economically and efficiently constructed and operated.

VIII.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the defendant may not be permitted to single out the commodity of coal and insist that the tariff of rates for the transportation of the same is unreasonable and confiscatory without being required to show that under the operation of such rates it will be unable to derive from its entire freight business within the state a just and reasonable profit.

IX.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the proof submitted in this case is insufficient to warrant the Court in holding the the rates prescribed by the law involved in this action are unreasonable and confiscatory.

X.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the evidence offered by the defendant, consisting of the comparison of coal rates in the other states referred to in the testimony, with the rate prescribed by the act here involved was improper, no foundation laid for the same, and should not
154 be considered; which holding was in effect a ruling sustaining plaintiff's objection to said evidence.

XI.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the testimony of the various witnesses, referred to by the Court as merely conclusions of the witnesses,—the same consisting of the testimony of the various witnesses who compiled the table of rates shown in the record herein as Exhibits C, G and X-3, and which testimony was to the effect that the revenue which would be derived from the transportation of coal at the tariff rate prescribed by the law involved in this action would be less than the expenses of operation, constituted the mere conclusion of said witnesses, was insufficient to overcome the prima facie validity of the law, and was insufficient to establish the unreasonableness and confiscatory character of said rates.

XII.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that freight commodities may be classified in fixing rates, and the reasonable rate for one class may be entirely unreasonable as to another, although both are identical as to bulk and weight, and the expense to the carrier is as great for the transportation of one as the other.

XIII.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that coal, being a necessity, and in general use by the public, is, and justly should be favored in making up rate classifications and schedules, and that it is legitimate to permit a transportation company, in order to earn a reasonable compensation upon its entire intra-state traffic, to charge and collect a high enough rate on general traffic to make up any deficiency caused by a lower rate on special commodities such as coal.

155

XIV.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that in the nature of things, it is impossible to say with any degree of accuracy what the effect of the enforcement of the rate involved in this action will be, and that there can be no accurate test except the test of experience.

XV.

The Court erred in its opinion, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the natural effect of cheaper rates will be to increase the demand for native coal all over the state, and

this may result in enabling the carrier to transport such articles in train load lots, and hence at greatly decreased expense.

XVI.

The Court erred in its decision, holding and finding, as shown by the opinion heretofore rendered in the above entitled action, wherein it was held that the law involved in this act does not violate the Interstate Commerce Clause of the Constitution of the United States.

XVII.

The Court erred in ordering that a writ of injunction be issued as prayed for in the petition herein.

XVIII.

The Court erred in entering and causing and permitting to be entered a judgment in this action in accordance with the prayer of plaintiff's petition for injunction herein.

Wherefore, The said defendant, and plaintiff in error, prays that the judgment of the said Supreme Court of the State of North Dakota be reversed, and judgment entered in favor of the defendant, dismissing the application for injunction herein, and such other relief be granted as may be proper.

Dated this 27th day of May, 1909.

C. W. BUNN,
BALL, WATSON, YOUNG & LAWRENCE,
Attorneys for Defendant and Plaintiff in Error.

156 *Petition for Writ of Error to the Supreme Court.*

In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA on Relation of T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

The Northern Pacific Railway Company, defendant in the above entitled cause, feeling itself aggrieved by the judgment entered herein on the 27th day of May, 1909, comes now by C. W. Bunn and Messrs. Ball, Watson, Young & Lawrence, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable, the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and

stayed until the determination of said writ of error by the Supreme Court of the United States. And your petitioner will ever pray.

Dated May 27, 1909.

C. W. BUNN AND
BALL, WATSON, YOUNG & LAWRENCE,
Attorneys for Defendant.

Allowed.

Chief Justice of the Supreme Court of the State of North Dakota.

157 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of North Dakota, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Supreme Court of the State of North Dakota before you, being the highest court of law and equity of the said state in which a decision could be had in the said suit between the State of North Dakota, on relation of T. F. McCue, as Attorney General, plaintiff and defendant in error, and the Northern Pacific Railway Company, defendant and plaintiff in error, wherein was drawn in question the validity of a statute of the State of North Dakota on the ground of the same being repugnant to the Constitution of the United States and to the amendments to the Constitution of the United States, and the decision was in favor of is validity; and wherein was drawn in question the construction of *the* clause of the constitution of the United States and the amendments to the Constitution of the United States, and the decision was against the title, right, privilege, and exemption specially set up and claimed under such clause of said constitution and of the amendments thereto, a manifest error hath happened to the great damage of the said Northern Pacific Railway Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within —— days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States, should be done.

158 Witness, The Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this —— day of May in the year of our Lord One thousand nine hundred and nine.

Clerk of the Supreme Court of the State of North Dakota.

The foregoing writ of error is hereby allowed, the same to operate as a supersedeas.

——— ———,

Chief Justice of the Supreme Court of the State of North Dakota.

159 STATE OF NORTH DAKOTA:

In Supreme Court.

STATE OF NORTH DAKOTA on Relation of T. F. McCUE, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Know all men by these presents, That we the Northern Pacific Railway Company, as principal, and the National Surety Company, of New York, as surety, are held and firmly bound unto the State of North Dakota in the full and just sum of Ten Thousand (10,000) Dollars to be paid to the said State of North Dakota; to which payment well and truly to be made we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this — day of May in the year of our Lord One thousand nine hundred and nine.

Whereas, lately in a suit pending in the Supreme Court of the State of North Dakota between the State of North Dakota, on relation of T. F. McCue, Attorney General, plaintiff, and the Northern Pacific Railway Company, defendant, a final decree was rendered against the said defendant, and the said Northern Pacific Railway Company having obtained the allowance of a writ of error and filed a copy thereof in the office of the clerk of said court, to reverse the said decree in the aforesaid suit, and a citation having issued directed to the said State of North Dakota citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within — days from the date hereof; now the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, and if, (the decree
160 herein being affirmed by the Supreme Court of the United States) the said Northern Pacific Railway Company shall repay and return to shippers and consignees in respect of coal shipments hereafter made and affected by said decree, any charges which shall have been exacted by it in excess of the rates in said decree adjudged to be lawfully in force, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY.

By ——— ———, *Its Attorneys.*

NATIONAL SURETY COMPANY.

By ——— ———, *Its Attorney in Fact.*

Sealed and delivered in the presence of

——— ———,

——— ———,

The foregoing bond is hereby approved to operate as a supersedeas herein.

Dated May —, A. D. 1909.

———,
Chief Justice of the Supreme Court of the State of North Dakota.

161 In Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

Order Refusing Supersedeas.

The defendant in the above entitled action having made application to this court for a writ of error to the Supreme Court of the United States, accompanied by a request for a supersedeas, having filed its assignments of error with the clerk of this court on the 27th day of May, 1909, and having petitioned me, as presiding judge of this court, for such writ and supersedeas, and having tendered security therefor, a copy of which assignments of error, petition, proposed writ of error and proposed undertaking are hereunto annexed, I grant the application for the writ of error, upon filing a bond for costs, hereby fixed at $500.00, but deny the supersedeas. The security offered is adequate and the amount is sufficient, but in my opinion this is not a proper case for a suspension of the execution of the judgment pending the appeal in the Supreme Court, but as defendant desires to apply to a Justice of the Supreme Court of the United States for a supersedeas, an order has been entered staying execution for thirty days to enable it to do so.

Dated this 1st day of June, A. D. 1909.

B. F. SPALDING,
Presiding Justice of the Supreme Court of the State of North Dakota.

162 In Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. T. F. McCUE, Attorney General, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

I, R. D. Hoskins, Clerk of the Supreme Court of the State of North Dakota, do hereby certify that Hon. B. F. Spalding is now, and has been at the times herein named, the presiding judge of the Supreme Court of the State of North Dakota; that the annexed and preceding assignments of error is a true copy of the original assignments of error filed in my office on May 27th, 1909, and that the

preceding petition for writ of error, proposed writ of error and proposed undertaking are true and correct copies of the petition, form of writ of error and proposed undertaking presented to said judge; that the order refusing the supersedeas, but granting said writ, upon filing a bond for costs, thereto annexed, is the original order of said judge.

Dated this 2nd day of June, A. D. 1909.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of the State of North Dakota.

163 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of North Dakota ex rel. T. F. McCue, Attorney General, plaintiff, and The Northern Pacific Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-

164 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 21st day of June, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

165 [Endorsed:] N. P. 1625. Filed in the Clerk's Office, Supreme Court, N. Dak., Jun- 26, 1909. R. D. Hopkins, Clerk, by ——— ———, Deputy.

Personal service of foregoing accepted at Bismarck, N. D., June 26, 1909.

ANDREW MILLER,
Att'y Gen. N. D., Att'y for Def't in Error.

166 UNITED STATES OF AMERICA, *ss:*

To The State of North Dakota ex rel. T. F. McCue, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of North Dakota wherein Northern Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand nine hundred and nine.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

167 [Endorsed:] N. P. 1625. Filed in the Clerk's Office, Supreme Court, N. Dak., Jun- 26, 1909. R. D. Hoskins, Clerk, by ——— ———, Deputy.

Due and personal service of the within and foregoing citation accepted and admitted this 26th day of June 1909 at Bismarck, N. D

ANDREW MILLER,
Att'y Gen. N. D., Attorney for Defendant in Error.

168 STATE OF NORTH DAKOTA, ss:

In the Supreme Court.

I, R. D. Hoskins, Clerk of the Supreme Court of the State of North Dakota, do hereby certify that I return herewith to the Supreme Court of the United States the following papers:

Writ of Error;

Citation;

Complete transcript of all proceedings had in the supreme court of the State of North Dakota, in the case entitled

STATE OF NORTH DAKOTA ex Re. T. F. McCUE, Attorney General, Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

I further certify that the above and foregoing constitute the entire record in said supreme court of the State of North Dakota and the same are herewith returned as commanded by said writ of error.

Witness my hand and official seal at Bismarck, State of North Dakota, this 9th day of July, A. D. 1909.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court, State of North Dakota.

Endorsed on cover: File No. 21,779. North Dakota Supreme Court. Term No. 553. The Northern Pacific Railway Company, plaintiff in error, vs. The State of North Dakota ex Rel. T. F. McCue, attorney general. Filed July 30th, 1909. File No. 21,779.

FILED
OCT 6 1909
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1909

NORTHERN PACIFIC RAILWAY CO., *Plaintiff in Error*, vs. STATE OF NORTH DAKOTA, EX REL. T. F. McCUE, ATTORNEY GENERAL, *Defendant in Error.*	No. 553.
GREAT NORTHERN RAILWAY CO., *Plaintiff in Error*, vs. STATE OF NORTH DAKOTA, EX REL. T. F. McCUE, ATTORNEY GENERAL, *Defendant in Error.*	No. 554.
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO., *Plaintiff in Error*, vs. STATE OF NORTH DAKOTA, EX REL. T. F. McCUE, ATTORNEY GENERAL, *Defendant in Error.*	No. 555.

Writs of Error to the Supreme Court of the State of North Dakota.

Motion for Advancement

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In The

SUPREME COURT

of the

UNITED STATES

October Term 1909

No.....

NORTHERN PACIFIC RAILWAY CO.,

Plaintiff in Error,

vs.

STATE OF NORTH DAKOTA, EX REL. T. F. McCUE, ATTORNEY GENERAL,

Defendant in Error,

GREAT NORTHERN RAILWAY CO.,

Plaintiff in Error,

vs.

STATE OF NORTH DAKOTA, EX REL, T. F. McCUE, ATTORNEY GENERAL,

Defendant in Error,

MINNEAPOLIS, ST. PAUL & SAULT SAINT MARIE RAILWAY CO.,

Plaintiff in Error,

vs.

STATE OF NORTH DAKOTA, EX REL, T. F. McCUE, ATTORNEY GENERAL,

Defendant in Error,

MOTION FOR ADVANCEMENT.

Comes now the above named defendant in error, the State of North Dakota, ex rel. Andrew Miller, successor in office to T. F. McCue, Attorney General, by their solicitors, Andrew Miller, Attorney General of the State of North Dakota, and Guy C. H. Corliss and T. F. McCue, and move this Honorable Court that the above entitled causes which have been consolidated and are to be argued together as one case, be advanced upon the calendar of this Court to such date
2 and time as may to this Court seem most convenient, and that the said causes may be speedily heard and determined.

STATEMENT OF MATTER INVOLVED.

These three cases were instituted by the attorney general of the State of North Dakota in the Supreme Court of said State upon petition to compel each of the defendants therein to put in force the schedule of rates for the Intrastate transportation of coal in North Dakota, prescribed by Chapter 51 of the Laws of 1907, and to have each of said defendants enjoined from charging any rate for said transportation of said coal in excess of the rates prescribed by said law. Upon the filing of said petition the Court issued an order to show cause why the prayer thereof should not be granted. Upon the return day each of the defendants made its return to said order to show cause and in each of said returns the said defendants respectively urged that the said act of the said State of North Dakota prescribing said rates was void as in violation of the Commerce Clause of the Constitution of the United States vesting in Congress the power to regulate Interstate Commerce and was also void for the reason that the maximum rate fixed by said law was unremunerative, unreasonable, inadequate and confiscatory, and violated the 14th Amendment of the Federal Constitution.

By stipulation the Court made its order appointing a Referee to take the testimony in said cases. The testimony was taken in the case against the Northern Pacific Railway Company. By stipulation this testimony was made applicable to the other two cases so far as pertinent thereto.

Upon the final hearing before the Court upon the petitions, re-

turns and evidence the Court decided that the rates prescribed by said law were in all respects lawful and made its final order that the writ of injunction against charging any higher rates than those prescribed by the law involved, should issue. It is to review this final order that the several writs of error in these three cases were sued out.

A supersedeas has been allowed upon the execution of bonds to secure the repayment to the shippers of coal of the excess of the railroad rate over the rate prescribed by the law in question in case the decision of the Supreme Court of North Dakota is affirmed by this Court.

The reasons and grounds for this application to advance these three causes are the following:

First. Until these cases are finally decided the three railroad corporations involved therein, will, under the supersedeas granted in these cases, continue to charge the old rates which are in excess of the rates prescribed by the act in question. It is true that the shippers of such coal will be protected by the several bonds given by the defendants, respectively, but the recovery of such excess by such shippers will in no manner protect those upon whom the burden of this excessive rate will inevitably fall: The consumers of the coal. The shippers will add the excess of freight to the cost and collect it of the consumer. The real party who will be damaged by the perpetuation of the old rate until the final decision herein will receive no protection and secure no indemnity.

The legislature has embodied in this law a policy of great importance to the people of the State, towit: Cheaper fuel through cheaper transportation, and as a result the development of a great natural resource which, under the evidence in these cases is practically inexhaustible. The Supreme Court of the State has sustained the law, but under the supesedeas granted in these cases this vital policy will continue to be thwarted without any possibility of any financial equivalent to those who are the objects and beneficiaries of such policy: to wit: The consumers of coal.

Second: The case is of the greatest possible magnitude so far as the principle involved is concerned. The defendants do not claim that the North Dakota rates as a whole take away their power to earn a fair income upon their respective investments in the transportation business; but so far as this branch of the case is concerned they found their attack on the law upon the principle that the rate on each commodity

must pay the expense of transporting the same and something besides, it being claimed that the evidence shows that the cost of transporting coal in North Dakota is in excess of the rates prescribed.

Third: The case also involves the question of the highest national importance, to-wit: Whether this Court will overrule a long line of decisions and hold that every purely Intrastate rate is essentially a regulation of Interstate Commerce because of its indirect effect upon Interstate rates.

Respectfully submitted,

ANDREW MILLER,
Attorney General for State of North Dakota.

GUY C. H. CORLISS,
T. F. McCUE,
Solicitors for the Defendant in Error.

Whilst Counsel for the appellants in the causes above entitled cannot concur in the statement of facts or in the statement of the questions involved made by counsel for appellee in their position to advance, they are quite willing that the causes be advanced and set down for argument at the earliest date convenient to the Court. They also consent to the motion to advance being submitted at the opening of the Octo-
5 ber, 1909 term, or at any subsequent day during the term.

CHARLES W. BUNN,
For the Northern Pacific Railway Co.

WILLIAM R. BEGG,
For the Great Northern Railway Co.

JOHN S. WATSON and
ALFRED H. BRYANT,
For Minneapolis, St. Paul & Sault Saint Marie Railway Company.

Office Supreme Court, U. S.
FILED.
JAN 17 1910
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 553.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

Supreme Court of the United States

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA.

Chapter 51, Laws of North Dakota 1907, fixes maximum rates to be charged by railroad companies for transportation of coal within the state. This is a writ of error from a decree of the Supreme Court of North Dakota enjoining the Northern Pacific Railway Company to obey this law. Similar writs of error are before the Court sued out by the Great Northern Railway Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company respectively, which by stipulation abide the event of this cause.

The Supreme Court of North Dakota expended much effort to show (a) that there is a *presumption* in favor of the legislative act, and (b) that the law is not a regulation of interstate commerce and void for that reason. At the outset these two questions may be removed from the case as we shall raise or discuss neither. We might however question how *strong* the presumption is in favor of a legislative act making a complicated tariff, necessarily without hearing or adequate investigation (*Ex parte Young*, 209 U. S. 123, 147), especially in a state which had a Railroad Commission, whose duty it was to fix coal rates and other rates of railway companies (Revised Codes North Dakota, Sec. 4343) and who evidently thought the statutory rates too low (Transcript p. 82).

The plaintiff in error bases its contention on the proof in the record that the statutory rates are confiscatory, and before taking up the proofs it is well to inquire just what the Supreme Court of North Dakota said upon the question of confiscation.

It appears from the opinion below (Transcript p. 131) that the Attorney General of North Dakota in that court rested his case as to this question upon the proposition thus stated by the court: "The proposed rate is not unreasonable, even though it is not compensatory, provided the defendant is earning a fair profit upon its entire business in this state." The Supreme Court of North Dakota adopted this contention, thinking it followed from decisions of this Court, and held: that even though the legislative rate be uncompensatory for the service covered thereby, still no objection can be urged by the carrier, until it can show that its business in the state is uncompensatory as a whole (Opinion Transcript pp. 132-137).

ASSIGNMENT OF ERRORS.

The Supreme Court of North Dakota erred:

(1) In not finding from the testimony that the statutory rates on coal are confiscatory, considered apart from other business; and

(2) In holding that even if so the plaintiff in error's contention failed because it did not allege or prove that its whole business in North Dakota was done at a loss.

THE FACTS.

The suit is one brought originally in the Supreme Court of North Dakota and the prayer is for an injunction compelling the plaintiff in error to obey the act of the legislature

(Transcript pp. 1-3). In response to an order to show cause the plaintiff in error pleaded as one defense, that the rates fixed by statute are "unremunerative, unreasonable, inadequate and confiscatory" and violate for that reason the fourteenth amendment to the Constitution of the United States. Thus it appears that a question was presented to the State Court at the earliest opportunity, which confers on this Court jurisdiction of the writ of error.

At the outset it is important to note that the evidence offered by plaintiff in error was undisputed. It is not necessary to weigh conflicting evidence. Our only inquiry is, what did the evidence of plaintiff in error fairly prove.

When considering the reasonableness of the whole schedule of a carrier's tariffs its earnings and its return on a fair valuation of its property throw some light on the question. This can seldom or never be true where the inquiry concerns the reasonableness of one rate only. The carriage of coal locally within North Dakota obviously is but a small part of a railway's whole business; and in determining what is a reasonable rate for such carriage its earnings on all business and their relation to the value of all its property throw no light on the question. In such cases the controlling consideration would seem to be the fair value of the service rendered. *Smyth v. Ames*, 169 U. S. 466, 544; *Cotting v. Kansas City Stock Yards Company*, 183 U. S. 79.

The plaintiff in error asserts, and attempted to show by evidence, that the proposed legislative rate on the coal locally carried in North Dakota would not pay the actual cost of such carriage, saying nothing of either taxes or of any return whatsoever for the use of its property.

To show this fact it offered proof (a) by comparison of the rate in question with other rates, (b) by computation of

the cost of such transportation, (c) by opinion of witnesses based on experience.

These seem to be the only kinds of proof of which such questions admit. We submit with confidence that no other line or kind of evidence, throwing any light on the question of fact at issue can be suggested; and if our proofs are satisfactory we are warranted in asserting that our proposition of fact is established. What were the proofs?

(a) By comparison with other rates.

Defendant's Exhibit 1 (Transcript pp. 26-45) is a table showing the distances of each station on plaintiff in error's lines in North Dakota from New Salem, Blue Grass, Sims, Lehigh, Zenith and Bismarck (the points on its lines where coal is or may be mined or received in North Dakota) also comparing for each possible haul the company's present rate, the proposed legislative rate in controversy, the Iowa Commissioners' rate and the Illinois Commissioners' rate for the same distance. This table shows that the present rates of the plaintiff in error compare favorably with the coal rates in Illinois and Iowa, and that the rates in controversy are much lower at every distance than either the Illinois or Iowa rates.

Defendant's Exhibit 3 (Transcript p. 47) condenses this showing, comparing the proposed North Dakota rates with the Iowa Commissioners' rates, the Illinois Commissioners' rates and the legislative rates in Minnesota, which latter are among the rates in litigation as to their reasonableness (a phase of the litigation came to this court in *Ex parte Young*, 209 U. S. 123). This comparison shows that the proposed rates are at every distance from five to seventy-two per cent lower than the rates in either of the three states named. The exhibit is as follows:

DEFENDANT'S EXHIBIT 3.

	North Dakota Present Rate	North Dakota Proposed Rate	Iowa Commissions Rate	Illinois Commissions Rate	Minnesota Legislative Rate in Litigation
25 m.	50 New Salem to Kurtz	38	46 or 15 per cent higher	54 or 35 per cent higher	54
50 m.	75 New Salem to McKenzie (52 m)	46	66 or 40 per cent higher	76 or 63 per cent higher	62 or 31 per cent higher
75 m.	86 New Salem to Rankin (75 m.)	53	85 or 72 per cent higher	85 or 72 per cent higher	72 or 30 per cent higher
100 m.	96 New Salem to Crystal Springs (98 m.)	61	100 or 61 per cent higher	90 or 45 per cent higher	82 or 32 per cent higher
200 m.	135 New Salem to Oakes (205 m.)	95	130 or 34 per cent higher	110 or 13 per cent higher	116 or 19 per cent
300 m.	166 Lehigh to Fabian (302 m.)	119	150 or 25 per cent higher	126 or 5 per cent higher	154 or 28 per cent higher
400 m.	196 New Salem to Grafton (399 m.)	144	170 or 15 per cent higher	No rate	172 or 17 per cent higher
500 m.	217 Zenith to Grafton (487 m.)	169	190 or 12 per cent higher	No rate	

Defendant's Exhibit 4 (Transcript p. 48) makes a wider comparison, bringing in the local and interstate coal rates

DEFENDANT'S EXHIBIT 4

		DISTANCES											
		25	50	75	100	125	150	175	200	250	300	350	400
					RATES IN CENTS PER TON								
North Dakota—Present		50	75	86	96	101	113	123	138	158	174	185	196
North Dakota—Proposed		38	46	53	61	68	76	86	95	106	119	131	144
DISTANCE	Iowa	46	66	85	100	107½	115	122½	130	140	150	160	170
TARIFF	Illinois	54	76	85	90	95	100	105	110	117	126	134	139
RATES	Missouri	50	70	85	100	110	125	135	150	165	185	205	215
	Kansas	90	115	140	150	195	215	230	245	280	325	380	410
	Kansas City, Mo	50	75	90	124	132	132	132	146	160	195	240	250
	Rock Springs, Wyo	150	150	150	150	150	200	250	275	300	300	450	450
	Pittsburg, Kans	53	70	75	75	84	100	100	100	136	175	192	192
RATES FROM	Rates from points in												
TERMINAL AND	Nebraska set by I. C. C.												
PRODUCING	From Rock Springs, Wyo.	...	...	...	...	...	...	...	...	...	...	...	300
POINTS	From Hanna, Wyo	...	...	...	...	...	...	...	...	225	...	250	...
	EASTERN RATES												
	Indiana	35	45	60	60	70	70	75	100	130	135	145	150
	Ohio	30	60	60	65	80	90	100	100	100	135	135	165
	Pennsylvania	...	...	...	125	125	130	135	135	135	145	145	190
	To Philadelphia, Pa.,												
	FROM												
	Huntingdon	...	...	...	...	...	...	...	160	...	...	...	...
	Altoona	...	...	...	...	...	...	...	...	160	...	...	...
	Johnstown	...	...	...	...	...	...	...	...	...	160	...	...
	Hillside	...	...	...	...	...	...	...	...	...	160	...	...
	Pittsburg	...	...	...	...	...	...	...	...	...	...	200	...

through Pennsylvania, Ohio, Indiana, Illinois, Missouri, Kansas, Nebraska and Wyoming. It is as follows:

In *George's Creek Basin Coal Company v. B. & O. R. R. Co.*, 14 I. C. C. R. 127, the commission considered rates to tidewater from some of the largest coal producing regions of this country. The commission states (p. 129) that the rates from three districts, the George's Creek Basin and the Pennsylvania and West Virginia fields were the same, namely, $1.60 a ton, irrespective of quality of coal, to Baltimore and to Philadelphia. When consigned beyond Baltimore and Philadelphia by water these coals met strong competition of other districts and the $1.60 per ton rate was shrunk. The shrinkage was greater on shipments outside the capes than on those inside because the competition met was more severe. The mines considered were 190 to 272 miles distant from Baltimore. The rate for delivery at Baltimore was $1.60 per ton from all the mines: same coal to Baltimore for water shipment (a) inside the capes $1.30 to $1.40 a ton, (b) outside the capes $1.18 to $1.33 a ton. The North Dakota statutory rate for 190 miles is ninety-one cents a ton and for 272 miles is $1.14 a ton.

were shown to have been taken from the latest published tariffs on soft coal (Transcript pp. 20-23) and the Attorney General was invited to inspect the tariffs and was offered for the purpose the assistance of the Railway Company's rate clerks (Transcript p. 23).

The showing of this exhibit is that, except as to the rate from Bellaire for twenty-five miles and from Brazil, Indiana, under two hundred miles, the rates here objected to are much lower than any of the rates in the territory covered by the comparison.

Mr. Baird, General Freight Agent of the Northern Pacific, testified (Transcript p. 11):

> "A. I do not know of any general basis of rates in any other section that is as low as the rates in North

Dakota. There are instances for certain distances where, for some particular reason, the rate would be as low as North Dakota, but the general basis of rates in North Dakota is lower than it is anywhere else.

Q. When you speak of the rates in North Dakota, you are speaking of these legislative rates?

A. Of these legislative rates, yes, sir.

Q. Have you taken occasion to examine the tariffs in the various states that I have named as a basis of your statement?

A. Yes, sir; at the time this bill was before the legislature I took occasion to compare the rates as shown in that bill with the various coal tariffs in other states of the different railroads, and I found that they were very much lower than the rates made elsewhere."

"Defendant's Exhibit 5 (Transcript p. 49) compares the coal rate fixed by the act with the rates upon grain into Minneapolis, and shows that the proposed coal rate is at all distances much less than half the grain rate. Coal and grain are articles of equal necessity, but the grain business is vastly the greater in North Dakota, and the grain rates compared with are those that enable wheat to be raised in and shipped out of North Dakota in competition with territory much nearer to the world's markets. The exhibit follows:

DEFENDANT'S EXHIBIT 5.

	Grain rate to Minneapolis per 2,000 lbs.	North Dakota legislative coal rate per 2,000 lbs.
25 miles	$1.00	$ .38
50 miles	1.40	.46
75 miles	1.40	.53
100 miles	1.60	.61
125 miles	1.70	.68
150 miles	1.90	.76
175 miles	2.00	.86
200 miles	2.00	.95
225 miles	2.20	1.01
250 miles	2.30	1.06
275 miles	2.50	1.14
300 miles	2.60	1.19

The court below, whilst holding that this evidence was immaterial and could not be considered, went out of its way to say that no proof was offered to show the foreign rates to be reasonable; also that *no proof was offered* that conditions in the other territory were similar to those in North Dakota. Is it not absurd to ask us to prove the foreign rates reasonable when such proof would have been inadmissible? Their reasonableness is not in issue and could not be passed on in this suit. They were introduced only for comparison, a most common method of testing reasonableness of rates, and under proper restrictions a most cogent method of proof. The only fact material is that they are the rates in fact charged and paid from Pennsylvania to Wyoming. Whilst custom is not controlling, for there may be a custom to make excessive charges, *yet in the absence of testimony to the contrary* a customary charge will be regarded as reasonable. *Cotting v. Kansas City Stock Yards Company*, 183 U. S. 79, 97, 98; *Canada Southern Ry. v. International Bridge*, 8 App. Cas. 723. And in view of the testimony in the record the statement that *no proof was offered* showing conditions in the other states to be similar to those in North Dakota, is astounding. Convincing proof was offered (the case hardly required it) that all the conditions called for higher rates in North Dakota than in the other states named.

William G. Johnson, Assistant Comptroller of the Northern Pacific, caused to be made up from the company's freight abstracts a statement of the carloads of lignite shipped from all stations in North Dakota to all other stations in that state during the year ending June 30, 1908 (Transcript p. 50) and the results are tabulated in Defendant's Exhibits A and B (Transcript pp. 94-97). Most of this coal, 2,269 cars, was shipped from two stations, Lehigh and Bismarck.

A few cars were shipped from Sims and New Salem, and these are included in the tonnage statement of Exhibit B (see Transcript pp. 50, 51). The 2,269 cars received at Lehigh and Bismarck were moved to 108 different stations and the average haul of all coal received was 87.01 miles.

The company received therefore an average of less than eight cars of coal a day for local haul in North Dakota, and moved it from four stations to one hundred and eight or more. Therefore it hauled a car or two at a time and never a train (Transcript pp. 11, 21, 76, 82). Moreover, as the average haul was but eighty-seven miles witnesses testified that this meant a haul mostly in way freights which are lightly loaded trains.

This was contrasted by the witnesses with conditions in the territory compared with, where population is more dense, factories more numerous, production and consumption of coal much larger and where the movement is largely in fully loaded trains. Witnesses of experience testified that these facts especially, and all the other conditions of railroad operation, required a higher rate on coal in North Dakota than in the other territory referred to (see Witness Baird, Transcript pp. 10, 11; Witness Post, pp. 20, 21; Witness Johnson, pp. 54, 55, 57; Witness Elliott, pp. 64, 65, 66, 75; Witness Pennington, pp. 76, 81; Witness Martin, pp. 82, 83).

Again, notwithstanding the decision below was rested on the proposition that to make a case we had to show unprofitableness of the Railway Company's North Dakota business as a whole, and notwithstanding this view involves holding that our evidence was immaterial to the issue in the case, the court found fault with the *form* of our proof; saying (Transcript p. 136) that our proofs of foreign rates were *copies in no way authenticated.*

It is not true that our proofs were copies. The exhibits referred to by the court as copies are numbers 1, 3 and 4, which are tables made by rate clerks Faithorn and Post who state how they were compiled. The Iowa and Illinois local rates given were taken from publications purporting to be official which were accurately described (Transcript p. 16) but we did not introduce the publications. The witnesses stated facts a part of which they took from these publications, testifying that the publications were generally recognized and followed as official the country over (Transcript pp. 13-16). The other rates outside Dakota were taken from the latest published tariffs of railway companies. The tariffs were not offered but only referred to by the witnesses as sources of information. Each tariff used was described and inspection offered to counsel for the state, and it was shown that they were recognized generally as the real tariffs they purported to be. Printed documents are admissible under principles long established, where they purport on their face to be genuine and are shown to be "commonly accepted." *Wigmore on Evidence*, sec. 1684 c. No error in the rates stated in the exhibits has been suggested, though the official publications and tariffs used were submitted to counsel for the state, and not even suspicion can be entertained of their correctness. The method of proof was customary and necessary. It was perfectly fair and the objection a quibble.

(b) By computation of the cost of transportation.

Mr. Elliott and Mr. Johnson testified to what is doubtless evident to any reflecting person, namely, that it is impossible to show the cost of moving any given article of freight over any given haul; but here again offering the best proof the nature of the inquiry admits of, Mr. Johnson submitted and explained lucidly a showing, that plaintiff in error's

actual outlay for moving the freight in question exceeds the revenue proposed to be paid for the service.

Mr. Johnson's evidence is condensed in Defendant's Exhibit C which he prepared and which is as follows (Transcript pp. 98, 99):

"DEFENDANT'S EXHIBIT C.

North Dakota Legislative Coal Rates.

The Northern Pacific report to the Railroad Commission of North Dakota for the fiscal year ending June 30, 1908, will show the following data bearing on the business of the company for that year:

Gross earnings	$9,593,189.01
Operating expenses	5,603,704.28
Ratio of operating expenses to earnings, per cent	58.414
Freight revenue	6,432,126.60
Tons of revenue freight carried	3,346,863
Tons of revenue freight carried one mile	743,466,035
Average distance carried in the state, miles	222.14
Rate per ton per mile, mills	8.652

The exhibit attached shows that the lignite coal business in North Dakota for the same period produced a

Revenue of	$40,348.88
Tons carried were	64,257
Tons carried one mile	5,590,993
The average distance carried was, miles	87
The average rate per ton per mile was, mills	8.83
The average revenue per car was	$20.81
And that at the rates proposed by the legislature this business would have produced a revenue of	$36,311.49
A reduction of	13,037.39
Equal to, per cent	26.42
The average rate per ton per mile would be, mills	6.49

The average earnings per carload would be $15.52
The average earnings per car mile would be 17.84

Applying the ratio of operating expenses for all business in the state to the freight business (and from an investigation it has been determined that the result would vary only a fraction from that arrived at by the use of arbitrary bases for dividing expenses common to both classes of business), and we have the following results:

Average rate per ton per mile received (as hereinbefore shown) was, mills..... 8.652
Operating expenses, per cent..... 58.414
Makes cost per mile for all freight, mills..... 5.054

This cost covers business with an average haul in the state of 222 miles, or two and one-half times the average haul of the lignite coal business. Furthermore, it includes business passing through Dakota hauled as high as 2,000 miles, in connection with which little or no terminal service is required in the state.

The exhibit attached shows that the lignite coal business, during the year used herein, was distributed to 108 different points on the main line and branches of the Northern Pacific in the state of North Dakota. The average haul of 87 miles being less than the length of any one main line operating district in the state, it necessarily follows that this coal should be classified as way freight and branch line train business.

An investigation discloses that main line way freights and branch line trains carried only one-third of the paying tonnage that is carried in main line through freight trains, and that the latter trains carry two and one-half times as much gross tonnage. It is, therefore, fair to assume that the cost of conducting transportation in connection with this short haul lignite coal business is at least two and one-half times that of the average for all business.

In the average operating cost per ton mile of 5.054 mills, hereinbefore shown, there is included for con-

ducting transportation 2.236 mills, so that we have the following figures as representing a fair amount of the cost of handling this coal:

Average cost per ton per mile for all freight, (including 2.236 mills for conducting transpn.), mills	5.054
Add—for additional cost of cond. transpn. 150 per cent of 2.236 mills, or 3.354 mills or mills	3.354
Or a total cost per ton per mile of, mills	8.408
As hereinbefore shown, the rates proposed by the state would produce, mills	6.490
So that the company would be losing on each ton mile of lignite coal, mills	1.918
Equal to, per cent	29.5
The average rate per ton per mile at present received on this business, as hereinbefore shown, was, mills	8.83
The cost shown above is	8.41
A profit of, mills	0.42
Equal to, per cent	5

The cost figures herein used do not include taxes or other fixed charges."

Mr. Johnson finds from the Northern Pacific Railway Company's report to the Railroad Commission of North Dakota year ending June 30, 1908, that the average rate per ton per mile received for freight transportation in North Dakota was 8.652 mills, the average haul of all freight in that state 222.14 miles and the ratio of operating expenses to earnings 58.414 per cent; that is, it cost 58.414 cents out of every dollar received as revenue from both passengers and freight to move both the passengers and the freight.

These expenses are made up of five general kinds: (a) maintenance of way and structures, (b) maintenance of equipment, (c) traffic expenses, (d) transportation expenses and (e) general expenses (Transcript p. 55), and obviously

certain of these expenses, like maintenance of way and structures and general expenses, are incapable of being divided between freight and passenger business except upon some arbitrary basis. If it is desired to know what percentage of freight revenue the cost of moving freight is, some arbitrary basis of division must be agreed upon for apportioning as between passenger business and freight business *certain* of the operating expenses. As shown by Mr. Johnson and Mr. Elliott, the basis of division most commonly used is train mileage, that is, for example, the cost of keeping the track in repair is divided between passenger and freight business according to the train mileage in each, and the salary of general officers is divided in the same way. But Mr. Johnson says (Transcript pp. 53-54) that it is very much more simple and would come to the same result in the particular problem in hand, to divide the total operating expenses on a gross earnings basis; that is, it would produce substantially the same result as the more elaborate process, to assume that it cost during the year in question in North Dakota 58.414 per cent of passenger earnings to do the passenger business and the same per cent of freight earnings to do the freight business.

On this assumption it follows, the average earnings on freight in North Dakota being 8.652 mills per ton mile, that it cost on the average 5.054 mills to transport a ton of freight one mile in North Dakota. Mr. Johnson testifies that this is as nearly an accurate computation of average cost as he knows how to make (Transcript p. 54). But this average cost of 5.054 mills per ton mile applies to freight, the average haul of which was 222 miles, or over two and one-half times the average haul of the coal. Furthermore it includes trans-continental freight hauled through the state of North Dakota as far as two

thousand miles, in connection with which there is little or no terminal service within the state. Considering that the coal business was distributed to one hundred and eight different stations on main line and branches with an average haul of eighty-seven miles for each car, being less than the length of any main line operating district in the state, Mr. Johnson says that the coal must have been transported in way freight trains. In this he is corroborated by witnesses Elliott, Pennington and Martin. Next Mr. Johnson testifies that his investigation of the train manifests of the Northern Pacific Company shows that way freights, branch line freights and mixed trains (all branch line and mixed trains being "way freights") carry only one-third the freight tonnage of through freight trains, which latter trains carry two and one-half times as much gross tonnage. Mr. Johnson says that for the reasons thus briefly indicated it is fair to say that the cost of conducting transportation in way freight trains is at least two and one-half times the average cost of conducting all the freight business in the state. He says that it costs about as much to haul a way freight or branch line freight train as it does a through freight. Mr. Johnson took into account some of the most obvious elements of the problem only: if it costs the same to run two trains and one carries three times as much freight as the other it is plain that each ton in the lightly loaded train has cost to carry three times as much as a ton in the heavy train; and it is self-evident that way freight trains cannot be fully loaded. Mr. Johnson's conclusion upon this subject is well supported by the testimony of Messrs. Elliott, Pennington and Martin based upon their practical experience and is conformable to the testimony in *Smyth v. Ames*, 169 U. S. 466, 529, which was adopted by this court. This testimony does not mean, neither did the testimony in

JAN 31 1910
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 553.

THE NORTHERN PACIFIC RAILWAY CO.,
Plaintiff in Error,

vs

STATE OF NORTH DAKOTA, *ex rel.* T. F. McCUE,
Attorney General,
Defendant in Error.

T. F. McCUE, Attorney General
for State of North Dakota,

ANDREW MILLER,
Attorneys for Defendant in Error.

GUY C. H. CORLISS,
Of Counsel.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR.

Smyth v. Ames mean, that the whole operating expenses should be multiplied from two to four times to determine the cost of moving short haul business as compared with through business; but that that portion of operating expense included under the cost of conducting transportation should be so multiplied. In the average operating expenses per ton mile for all freight 5.045 mills there is included 2.262 mills, the cost of conducting transportation. Adding one and one-half times this cost of conducting transportation to the average cost of moving a ton of freight produces as the cost of moving this coal 8.408 mills per ton mile (Transcript pp. 56-57).

But the rates proposed by the legislature would yield upon the business done by plaintiff in error in the year ending June 30, 1908, only an average revenue of 6.490 mills, so that there would be lost on each ton of lignite coal hauled one mile 1.918 mills or about twenty-nine and one-half per cent of the revenue (Transcript p. 56). Mr. Johnson figures that at existing rates the business is productive of a negligible profit of .42 of a mill per ton mile equal to five per cent of the revenue, and the witness' cost figures do not include taxes, trackage rentals, interest on bonds, other fixed charges, or any dividend whatsoever on stock. In other words his computation proves, if sound, that the proposed legislative rate would yield much less than the actual cost of transporting the freight, leaving no contribution whatsoever to the company's taxes or to payment for the use of its property.

The same result is reached by another computation. Mr. Elliott testified that it cost at least twice, and from that to four and perhaps even five times as much, to move way freight as through freight (Transcript p. 65) and Mr. Pennington says that it costs anywhere from two to three times

as much (Transcript pp. 76-7). This accords with the testimony in *Smyth v. Ames* (see opinion pp. 528-9), and with much testimony to the same effect in *Northern Pacific Railway Company v. Keyes*, 91 Fed. Rep. 47 (opinion pp. 53-4). Assuming that owing to short haul and light train loading the transportation in question costs only twice the average cost in North Dakota, we get the result following:

Average cost	5.054	mills
Add cost of transportation	2.236	"
Total	7.290	"

But the revenue received based on the year's business in proof would be 6.490 mills, an actual loss of .8 of one mill or 12.3 per cent of the revenue.

Great Northern Exhibit 2 (Transcript pp. 101, 102) shows that the average rate fixed by the act is 4.164 mills. This showing is based on the supposition that an equal amount of coal is shipped for each distance named in the tariff; and it shows that if that were the case the plaintiff in error would receive for the coal less than half its average rate on freight in North Dakota. The Northern Pacific exhibits are based on the business actually done in a certain year and the average legislative rate as applied to that business would have been 6.49 mills. The different average in the two exhibits arises from the fact that the Northern Pacific business during the year taken moved eighty-seven miles, whilst the average distance covered by the tariff and treated in the Great Northern exhibit is two hundred and fifty miles.

These computations are reasonable and the argument to support them cogent. They keep well within the facts, being based mainly upon a proposition which cannot be disputed, namely that it costs much more to transport freight

in partly loaded trains than in fully loaded trains. Many circumstances have been omitted which prove an even greater disparity in cost between carrying short haul freight and long haul freight, such as increased switching and terminal service involved in short haul business, as well as the disproportionate time consumed in loading and unloading cars; it being obvious and testified to in the case that the same time in loading and in unloading is required in a short haul that is required in a long haul. Therefore in short haul business cars are idle and earning nothing a much larger proportion of the time than in long haul business. The present revenue per car in North Dakota coal business $20.81 shown in Defendant's Exhibit C (see also Mr. Martin's evidence, Transcript p. 84) is in itself suggestive; this price covers four days free time for loading and unloading besides the haul.

No answer to these computations was attempted, but the criticism was thrown out in the opinion below that the plaintiff in error's exhibits, being confined to lignite business, were not complete, as some coal not lignite might be moved. As to this, the testimony shows that eastern coal comes into the state from the head of Lake Superior and the haul thereof is entirely interstate and not subject to the act, except as small quantities of this imported coal may be redistributed in North Dakota. The testimony shows abundantly that such movement, as well as any local movement of lignite not included in our tables, is negligible, and that if such small movement should occur and should be included in the tables it would not change their result; because such omitted movement, if there be any, would be occasional and for short hauls, in short under the identical conditions surrounding the transportation of lignite mined within the state and included in the exhibits.

(c) Opinion evidence.

Howard Elliott, the President of the Northern Pacific Railway Company, Edmund Pennington, the President and General Manager of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, and W. L. Martin, the Traffic Manager of the last named company, all men of wide experience in actual movement of traffic both in North Dakota and in many other states, testified that from their knowledge of the business the rates proposed by the legislature would not pay, in their opinion, the actual cost of moving it (Transcript pp. 63-85).

Defendant in error did not controvert these proofs in any particular, and being undisputed we submit that they are satisfactory and establish the proposition, that under all the circumstances surrounding this traffic the revenue fixed by the legislative act would not repay the carrier the actual expenditure for the transportation. As we said at the outset, the Supreme Court of North Dakota decided the case on the proposition, that the legislative rate is reasonable even though not compensatory, provided the defendant is earning a fair profit on its entire business within the state. We shall now consider whether this proposition can be sustained.

THE LAW.

If the plaintiff in error, in order to show the unreasonableness of certain rates on coal, was bound to go farther and show unprofitableness of other rates, there is no basis for the limitation of those other rates to *"its entire business within this state."* Why not "its entire business *in all states?"* The business in North Dakota as reported to the Railroad Commission of that state includes (a) all local business and (b) a mileage proportion of all interstate busi-

ness passing through or moving into or out of that state, and the expression of the court "its business within this state" includes therefore much interstate business. There is no logical justification for stopping with the mileage proportion in North Dakota of interstate traffic. The proposition therefore, if sound at all, is, that plaintiff in error cannot complain of being forced to adopt one or many uncompensatory rates until the last imposition bankrupts it. Only that last imposition is illegal.

And, if because the carrier is earning well on all its business in North Dakota it can be forced to carry coal within that state at a loss, equally justifiable would be a requirement that it carry the coal without *any* compensation. This carrier received only $49,348.88 for local carriage of lignite in North Dakota during the year ending June 30, 1908 (Defendant's Exhibit C), and the amount of this business is so small that it might with equal legality, under the rule laid down, have been compelled to forego the whole revenue instead of 26.42 per cent of it.

And if the proposition is sound, each state, as well as the federal authority, has a right to select out some commodity or commodities favored by it, to be carried at grossly unremunerative rates, until the point is reached that the carrier's revenue as a whole is unremunerative for its traffic as a whole. And then pray, which unremunerative rate or rates so imposed can be singled out as the illegal ones?

The rule laid down by the court warrants each state, as well as the federal commission, to force a carrier to tax unjustly one class of traffic to make up losses incurred in moving other traffic at unremunerative rates; authorizes legislatures and commissions to create those very discrim-

inations declared illegal and forbidden by both federal and state legislation.

We submit that *Smyth v. Ames* set this question at rest. The court there said, 169 U. S. pp. 540-43:

> "It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify un-

reasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business.

Touching the suggestion that the reduction on rates made by the state law was reasonable, if regard be had to all the business, through and local, done in the State by the railroad companies, the Circuit Court said:

'But again, as Mr. Dilworth testified, the average reduction on local rates caused by House Roll 33 is 20½ per cent. The tariff which was in force at the time of the passage of this act had been, for some three or more years, fixed by the voluntary action of the railroad companies, and the reduction of 20½ per cent was from their rates. It must be remembered that these roads are competing roads; that competition tends to a reduction of rates—sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be

possible that any business so carried on can suffer a reduction of 29½ per cent in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of 29½ per cent? The effect of this testimony is not destroyed by the table offered of the percentage of reduction on the total amount of business done by these companies in the State as follows:

B. & M. R.	4.2 per cent.
C., St. P. M. & O.	4.5 per cent.
F., E. & M. B.	4.1 per cent.
Union Pacific	2.0 per cent.
O. & R. V.	1.9 per cent.
St. J. & G. I.	2.7 per cent.
K. C. & O.	1.5 per cent.

For such a table only indicates, as is further shown by Defendant's Exhibit 4, how small a proportion of the total amount of business done in the State comes from purely local freight. Nor is it weakened by any comparison between the amount of reduction and the total receipts from all business. It may be, as stated by counsel, that the annual earnings of the Chicago, Burlington & Quincy Company are $27,916,128, and that the total amount of reduction caused by this House Roll 33 is only $365,175. It may be that the capital stock of the company is $76,407,500, and that $365,175 distributed among the stockholders may not be for any of them a great sum; but the entire earnings of the C. B. & Q. are more than twenty times the receipts from local freight in Nebraska; and to reduce such earnings by twenty times $365,175 would make a startling difference in their amount. The fact that the State of Nebraska can reach only one-twentieth of the total earnings, gives it no greater right to make a reduction in respect to that one-twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent of reduction. If it would be unreasonable to reduce the total earn-

ings of these roads 29½ per cent, it is at least, *prima facie*, equally unreasonable to so reduce any single fractional part of such earnings.'"

The Supreme Court of North Dakota relies in support of its ruling upon several decisions of this court which will now be noticed.

St. Louis and San Francisco Railway Company v. Gill, 156 U. S. 649, was a case where the legislature of Arkansas fixed three cents per mile as the maximum passenger fare to be charged in that state, and the validity of this act was challenged upon allegations and proof, that upon a certain part only of the San Francisco Company's railway, namely, that extending from the northern boundary of Arkansas to Fayetteville, the three cent rate was uncompensatory. The court held (p. 665) that a railway company cannot claim the right to earn a net profit from every mile, section, or other part of its railroad, nor attack as unjust a regulation which fixes a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participate; and that in determining the reasonableness of a legislative passenger rate the whole line within the limits of the state must be considered. Undoubtedly there is a certain necessity that rates should be uniform and the impracticability in fixing different rates, each to apply on a particular section of a railroad, is apparent. Many branches and other parts of railroads are unremunerative, but this constitutes no ground for the carrier's asserting a right to charge such a rate upon each part of its line as will make that part standing by itself profitable. This decision has never been understood to conflict with what was held in *Smyth v. Ames*, and affords no justification for saying that coal or

any other commodity or commodities can be selected and ordered transported generally throughout a state at unremunerative rates.

Neither is the decision in *Minneapolis & St. Louis Railroad Company v. Minnesota*, 186 U. S. 257, authority for the proposition decided by the Supreme Court of North Dakota. In that case, as the court said on page 265, the rate fixed by the Minnesota Commission was not met by any showing that at the rates so fixed there would be no profit or an insufficient profit on the coal transported, but was attempted to be met by evidence of a trifling reduction of the revenue for transporting coal, and by a showing that if the coal rate were applied to *all* freight the road would not pay its operating expenses, including interest on its bonded debt and dividends. The court said that this testimony had but slight if any tendency to show the rates fixed by the commission unreasonable (p. 266), and distinguishing the case (p. 267) from *Smyth v. Ames* said, that it followed by no means from that decision that railway companies were entitled to earn the *same percentage of profits* upon all classes of freight carried. Confessedly coal generally carries a lower rate than the average of all traffic (though it is to be observed, as shown in the record in this case, much depends on the length of the haul). And what the court held was, that the rate on coal could not be said to be confiscatory, no evidence having been introduced to show it to be unremunerative for the service rendered, simply because a reduction of the average of all rates to the coal rate might leave the carrier insufficient revenue to pay operating expenses and interest on its bonded debt and dividends.

The case of *Atlantic Coast Line Railroad Company v. North Carolina Corporation Commission*, 206 U. S. 1, not

cited by the Supreme Court of North Dakota should be distinguished. Mr. Justice White's opinion (pp. 23-25) makes it apparent that the decision rested upon the right to compel the carrier to run a train for the service of the public; and it was held that where a train is required for the reasonable accommodation of the public a carrier cannot avoid such obligation by showing that the particular train would be unprofitable. Undoubtedly the case is authority for saying that a carrier may be compelled to serve the public, though not every one of its acts of service is performed at a profit. But no such justification exists for the compulsory rate here in question. No complaint is here made that the public is not well served. This case is like *Smyth v. Ames*, and involves the question, whether a state is entitled to compel a carrier to transport some kinds of traffic or all kinds of traffic at a loss, because the carrier on its busines as a whole may be making an adequate return.

In *Atlantic Coast Line Railroad Company v. Florida*, 203 U. S. 256, the carrier offered no evidence of the amount of phosphates carried, or whether the rate fixed by the commission was compensatory, how much change the commission's order made in the carrier's rates, or what effect the rates imposed would have on its income. The same is true of *Seaboard Air Line Railway v. Florida*, 203 U. S. 261. No evidence was offered in either case such as this record contains, and there was nothing before the court in either case from which it could be determined whether the rates were compensatory or not.

The only justification for the exercise of police power in fixing tariffs of public carriers is the prevention of exorbitant and oppressive rates, and that object is accomplished when regulations secure to the public reasonable and fair rates. Rate regulation therefore is limited to the

prevention of excessive exactions. Whilst the decisions already made lay down rules to be followed where the carrier's entire schedule is under examination, yet, where the inquiry touches the reasonableness of individual rates only, this court has not settled definitely what principle applies. *Atlantic Coast Line Railroad Company v. Florida*, 203 U. S. 256, 260. But the decisions warrant the assertion that individual rates on one hand should not exceed the value added by the service, nor on the other hand be reduced to less than the cost of rendering the service. A careful analysis of the opinion in *Minneapolis & St. Louis Railroad v. Minnesota, supra*, will lead to the conclusion that, had the company in that case been able to segregate the cost of coal transportation from the cost of its remaining business and to show it to be less than the compensation allowed by the commission, the court would have granted the relief sought. The court could have disposed of the case briefly without giving it the elaborate consideration which it received, unless in its judgment, either the value of the service or the cost of rendering it was the appropriate test to be applied. The statement in the opinion in *Atlantic Coast Line Railroad Company v. Florida, supra*, "*and there is nothing from which we can determine the cost of such transportation*" is significant. Mr. Justice White in the opinion in *Atlantic Coast Line Railroad Company v. North Carolina Corporation Commission*, 206 U. S. 1, 25-6, discusses the case on the concession that, where a scheme of rates imposed by state authority as a whole is adequately remunerative and yet some of the rates so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcends the limits of just classification, creating a favored class or classes whom the carrier is compelled to serve at a loss, to the

detriment of other class or classes upon whom the burden of such loss must fall, such legislation is invalid; and on the further concession that a like repugnancy to the Constitution of the United States arises from an order made under the power to fix rates, when the result of the enforcement of such order would be to compel a carrier to serve for an inadequate compensation a class or classes selected for legislative favor, even if considering the rates as a whole a reasonable return from the operation of its road may be received.

The plain inference from these decisions is, that a carrier's property is unlawfully taken by any public regulation which compels a certain class of traffic to be moved at less than cost, irrespective of whether such regulation creates a loss upon the carrier's entire business. This proposition would seem to have been involved and decided by this court in *Interstate Commerce Commission v. Stickney*, November 29, 1909. Counsel for the Interstate Commerce Commission in the Stickney case suggested to the three circuit judges upon the hearing in that court, 164 Fed. Rep. 638, 644, that no rates prescribed by the Interstate Commerce Commission for any service could be set aside or suspended, unless the complaining carrier made it appear that the enforcement of the rate would render unprofitable the business of the carrier throughout its whole line. The Circuit Court distinctly overruled that contention, which makes it apparent that this court when it decided the appeal had it in mind. *Missouri, Kansas & Texas Railroad Company v. Interstate Commerce Commission*, 164 Fed. Rep. 645, is another ruling of three circuit judges holding that rates established by public authority must admit of the carrier earning a reasonable compensation for the service rendered.

No one can contend it to be necessary for the protection

of the public that any rate be fixed by legislative authority below the cost of furnishing the service. Such a contention would be contrary to the fundamental purposes of the police power. And viewing the situation from the standpoint of the public, it can have no interest which ought to compel a carrier to furnish certain classes of service at less than cost, thus to charge the loss against the balance of the service. Such a principle is contrary to public policy.

Any discrimination by a public service company, which consists in rendering a service below its cost, is unjust discrimination and unlawful. It is inconceivable that a test of reasonable rates will be adopted by the court which would compel carriers to do the very thing forbidden by law. Any just rule therefore of rate regulation must preserve to the carrier both the right and the ability to render all services at remunerative rates.

Should it be said, that the public alone has the right to complain of discrimination which results in transferring the cost of certain service and placing the burden upon other service, and that the owner of the property affected has no constitutional right to complain, such a position ignores what we have above suggested. If the regulation compels a carrier to render a portion of its service at less than cost, inevitably this loss must be distributed over the balance of its business unless the carrier can refuse to render the service. The latter alternative is impossible. All service rendered at a loss results in burdening the balance of the carrier's service; and considering that railways are subject to the regulation of many different states, as well as to that of Congress, the necessary result of one state requiring service to be rendered at less than cost is to impose the loss on citizens of the other states and on the business of the country at large.

CHARLES W. BUNN.

APPENDIX.

CHAPTER 51.

MAXIMUM COAL RATE

AN ACT to Amend and Re-enact Chapter 146 of the Laws of 1903, being Section 4395 of the Revised Codes of North Dakota for 1905, Relating to the Maximum Coal Rate.

Be it Enacted by the Legislative Assembly of the State of North Dakota.

§1. Amendment.) Section 4395 of the revised codes of 1905 is hereby amended to read as follows:

§4395. Maximum coal rate.) All railroad companies doing business as common carriers within the state of North Dakota shall not charge for the transportation of coal within said state a greater rate per ton than the following:

For the first ten miles or fractional part thereof, thirty cents per ton.

For any distance over ten miles and not to exceed fifteen miles, thirty-five cents per ton.

For any distance over fifteen miles and not to exceed twenty miles, thirty-seven cents per ton.

For any distance over twenty miles and not to exceed twenty-five miles, thirty-eight cents per ton.

For any distance over twenty-five miles and not to exceed thirty miles, forty cents per ton.

For any distance over thirty miles and not to exceed thirty-five miles, forty-one cents per ton.

For any distance over thirty-five miles and not to exceed forty miles, forty-three cents per ton.

For any distance over forty miles and not to exceed forty-five miles, forty-four cents per ton.

For any distance over forty-five miles and not to exceed fifty miles, forty-six cents per ton.

For any distance over fifty miles and not to exceed fifty-five miles, forty-seven cents per ton.

For any distance over fifty-five miles and not to exceed sixty miles, forty-nine cents per ton.

For any distance over sixty miles and not to exceed sixty-five miles, fifty cents per ton.

For any distance over sixty-five miles and not to exceed seventy miles, fifty-two cents per ton.

For any distance over seventy miles and not to exceed seventy-five miles, fifty-three cents per ton.

For any distance over seventy-five miles and not to exceed eighty miles, fifty-five cents per ton.

For any distance over eighty miles and not to exceed eighty-five miles, fifty-six cents per ton.

For any distance over eighty-five miles and not to exceed ninety miles, fifty-eight cents per ton.

For any distance over ninety miles and not to exceed ninety-five miles, fifty-nine cents per ton.

For any distance over ninety-five miles and not to exceed one hundred miles, sixty-one cents per ton.

For any distance over one hundred miles and not to exceed one hundred and five miles, sixty-two cents per ton.

For any distance over one hundred and five miles and not to exceed one hundred and ten miles, sixty-four cents per ton.

For any distance over one hundred and ten miles and not to exceed one hundred and fifteen miles, sixty-five cents per ton.

For any distance over one hundred and fifteen miles and not to exceed one hundred and twenty miles, sixty-seven cents per ton.

For any distance over one hundred and twenty miles and not to exceed one hundred and twenty-five miles, sixty-eight cents per ton.

For any distance over one hundred and twenty-five miles and not to exceed one hundred and thirty miles, sixty-nine cents per ton.

For any distance over one hundred and thirty miles and not to exceed one hundred and thirty-five miles, seventy-one cents per ton.

For any distance over one hundred and thirty-five miles and not to exceed one hundred and forty miles, seventy-two cents per ton.

For any distance over one hundred and forty miles and

not to exceed one hundred and forty-five miles, seventy-four cents per ton.

For any distance over one hundred and forty-five miles and not to exceed one hundred and fifty miles, seventy-six cents per ton.

For any distance over one hundred and fifty miles and not to exceed one hundred and fifty-five miles, seventy-eight cents per ton.

For any distance over one hundred and fifty-five miles and not to exceed one hundred and sixty miles, eighty cents per ton.

For any distance over one hundred and sixty miles and not to exceed one hundred and sixty-five miles, eighty-two cents per ton.

For any distance over one hundred and sixty-five miles and not to exceed one hundred and seventy miles, eighty-four cents per ton.

For any distance over one hundred and seventy miles and not to exceed one hundred and seventy-five miles, eighty-six cents per ton.

For any distance over one hundred and seventy-five miles and not to exceed one hundred and eighty miles, eighty-seven cents per ton.

For any distance over one hundred and eighty miles and not to exceed one hundred and eighty-five miles, eighty-nine cents per ton.

For any distance over one hundred and eighty-five miles and not to exceed one hundred and ninety miles, ninety-one cents per ton.

For any distance over one hundred and ninety miles and not to exceed one hundred and ninety-five miles, ninety-three cents per ton.

For any distance over one hundred and ninety-five miles and not to exceed two hundred miles, ninety-five cents per ton.

For any distance over two hundred miles and not to exceed two hundred and ten miles, ninety-seven cents per ton.

For any distance over two hundred and ten miles and not to exceed two hundred and twenty miles, ninety-nine cents per ton.

For any distance over two hundred and twenty miles and

not to exceed two hundred and thirty miles, one dollar and one cent per ton.

For any distance over two hundred and thirty miles and not to exceed two hundred and forty miles, one dollar and four cents per ton.

For any distance over two hundred and forty miles and not to exceed two hundred and fifty miles, one dollar and six cents per ton.

For any distance over two hundred and fifty miles and not to exceed two hundred and sixty miles, one dollar and nine cents per ton.

For any distance over two hundred and sixty miles and not to exceed two hundred and seventy miles, one dollar and eleven cents per ton.

For any distance over two hundred and seventy miles and not to exceed two hundred and eighty miles, one dollar and fourteen cents per ton.

For any distance over two hundred and eighty miles and not to exceed two hundred and ninety miles, one dollar and seventeen cents per ton.

For any distance over two hundred and ninety miles and not to exceed three hundred miles, one dollar and nineteen cents per ton.

For any distance over three hundred miles and not to exceed three hundred and ten miles, one dollar and twenty cents per ton.

For any distance over three hundred and ten miles and not to exceed three hundred and twenty miles, one dollar and twenty-four cents per ton.

For any distance over three hundred and twenty miles and not to exceed three hundred and thirty miles, one dollar and twenty-six cents per ton.

For any distance over three hundred and thirty miles and not to exceed three hundred and forty miles, one dollar and twenty-nine cents per ton.

For any distance over three hundred and forty miles and not to exceed three hundred and fifty miles, one dollar and thirty-one cents per ton.

For any distance over three hundred and fifty miles and not to exceed three hundred and sixty miles, one dollar and thirty-four cents per ton.

For any distance over three hundred and sixty miles and not to exceed three hundred and seventy miles, one dollar and thirty-six cents per ton.

For any distance over three hundred and seventy miles and not to exceed three hundred and eighty miles, one dollar and thirty-nine cents per ton.

For any distance over three hundred and eighty miles and not to exceed three hundred and ninety miles, one dollar and forty-one cents per ton.

For any distance over three hundred and ninety miles and not to exceed four hundred miles, one dollar and forty-four cents per ton.

For any distance over four hundred miles and not to exceed four hundred and ten miles, one dollar and forty-seven cents per ton.

For any distance over four hundred and ten miles and not to exceed four hundred and twenty miles, one dollar and forty-nine cents per ton.

For any distance over four hundred and twenty miles and not to exceed four hundred and thirty miles, one dollar and fifty-one cents per ton.

For any distance over four hundred and thirty miles and not to exceed four hundred and forty miles, one dollar and fifty-four cents per ton.

For any distance over four hundred and forty miles and not to exceed four hundred and fifty miles, one dollar and fifty-six cents per ton.

For any distance over four hundred and fifty miles and not to exceed four hundred and sixty miles, one dollar and fifty-nine cents per ton.

For any distance over four hundred and sixty miles and not to exceed four hundred and seventy miles, one dollar and sixty-one cents per ton.

For any distance over four hundred and seventy miles and not to exceed four hundred and eighty miles, one dollar and sixty-four cents per ton.

For any distance over four hundred and eighty miles and not to exceed four hundred and ninety miles, one dollar and sixty-six cents per ton.

For any distance over four hundred and ninety miles and not to exceed five hundred miles, one dollar and sixty-nine cents per ton.

Provided, That the above mentioned rates shall be for carload lots only.

In case any shipment of coal under the provisions of this section must pass over two or more lines of railroad to reach its destination, then an additional charge of two dollars and fifty cents per car for each transfer may be allowed, and collected to cover cost of switching, and the total amount of freight and switching charges shall be divided among the several railroads concerned upon such basis as to them may seem just; provided, that if such railroads cannot agree among themselves upon an equitable division thereof, then the board of railroad commissioners shall decide the matter, subject to appeal to the courts.

Approved March 13, 1907.

FILED.
FEB 14 1910
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 553.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

Herein we purpose answering the somewhat remarkable computation presented by counsel in Point XI of their brief. Their computation is designed to show that coal might be carried profitably in trainloads at the proposed legislative rate.

In the first place, it is clear that coal will not be carried locally in North Dakota in trainloads within any reasonable period of time, and that no reduction of rate would bring about that result. The physical characteristics and population of the state force one to this conclusion. One of the largest states in area North Dakota is one of the smallest in population, having about 600,000 people. Its industries consist almost entirely in raising cereals. So far as known it has no mineral wealth and is almost destitute of factories. Such a state cannot have large centers of population. Therefore the consumption of coal compared with most of the states must be very small and very scattered, the testimony showing that during the year the Northern Pacific carried cars of coal locally from two points to 108 different stations with no considerable movement to any one. These facts cannot be overcome by Mr. Peake's expression of belief that reduction of rate would increase the demand for lignite coal so that to some unknown extent it might be carried by the train. The obvious and complete answer to the computation is that it is based on ideal conditions which do not exist.

In the next place, counsel seize on Mr. Elliott's statement that the average cost of transporting freight in trainloads in North Dakota is about two dollars a mile, ignoring the statement in previous answer (Transcript p. 71) that it was *something over* two dollars a train mile. Moreover Mr. Elliott in making this statement was speaking of the actual movement of freight in North Dakota with an aver-

age haul of about 222 miles, whilst the average haul of coal is only 87 miles. Counsel's assumption that the shortness of haul makes no difference ignores the obvious fact, testified to by Mr. Martin (Transcript p. 84), that cars are in use loading and unloading as long a time in short haul business as in that having a long haul.

In the next place, whilst counsel say that conducting transportation is about forty per cent of the whole operating cost, the true percentage is 44.24 per cent, which would increase the expenses as stated in their table and reduce the theoretical profit.

Why counsel, in preparing the table on page 53 of their brief, only include what is known in railroad accounts as the cost of conducting transportation and exclude the remaining 55.76 per cent of the operating expenses is difficult to understand. Other expenses are just as real as those coming under the technical head "conducting transportation." And if the assumed cost of two dollars per train mile be applied even to full trainload business such as counsel supposes, it can be proven that the railway company would lose money on every trainload of coal hauled beyond two hundred miles, whilst the profit on those hauled less than two hundred miles would be quite small compared with that stated by counsel. And unless the cars used to transport the coal could be loaded back to the mines it is easy to see that even the ideal business assumed would for every distance be unprofitable. The following table shows the result of applying an expense of two dollars per train mile to the supposed hauling of the coal in full trainloads:

Suppose 20 cars of 25 tons each moved as below:	CONDUCTING TRANSPORTATION		ALL OPERATING EXPENSES		REVENUE AT LITIGATED RATES			Net Revenue
	Per Train Mile	Amount	Per Train Mile	Amount	Per Ton	Per Ton Mile	Amount	*Net Loss*
100 miles	88.48c	$ 88.48	$2.00	$ 200.00	$0.61	0.610c	$ 305.00	$105.00
200 "	88.48	176.96	2.00	400.00	0.95	0.475	475.00	75.00
300 "	88.48	265.44	2.00	600.00	1.19	0.397	595.00	*5.00*
400 "	88.48	353.92	2.00	800.00	1.44	0.360	720.00	*80.00*
500 "	88.48	442.40	2.00	1000.00	1.69	0.338	845.00	*155.00*
		Total		Total	Average	Average	Total	
Total for 100 Cars..		$1327.20		$3000.00	$1.176	0.392	$2940.00	$ *60.00*
Assuming 20 to move at each distance above.								

*losses in italics

If the theory of counsel is correct, that the train mile cost remains constant regardless of distance, the tariff in litigation strikingly violates this principle; because according to that tariff $.60 per ton is the charge for one hundred miles, $.95 per ton the charge for two hundred miles, while $1.69 is the charge for five hundred miles, and throughout the tariff rate decreases rapidly with increasing distance. From which the natural deduction is, either that the tariff itself, or that counsel's assumption that the cost of transportation remains constant with increasing distance, is incorrect; and viewed from the principle, well recognized in making rates, that the long haul is entitled to a lower rate than the short haul moved under similar conditions, it is quite evident that the theoretical assumption cannot stand that the cost per train mile remains constant regardless of distance hauled.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 553.

THE NORTHERN PACIFIC RAILWAY CO.,
Plaintiff in Error,

vs.

STATE OF NORTH DAKOTA, *ex rel.* T. F. McCUE,
Attorney General,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR.

POINT I.

If the doctrine contended for by counsel for the defendants be sustained by this Court the decision will not merely mark an epoch—it will inaugurate a revolution in the development of the law relating to the regulation of trans-

portation charges by the railways of the country. The result of such a decision would be seriously to cripple if not practically destroy the rate making power of the nation and of every state. The railroad companies in this case in effect contend that they have a constitutional right over and above that of earning a fair income upon the value of their respective investments and that that constitutional right is the right to have every rate on every commodity pay the theoretical cost of service and something besides. It is not claimed that the effect of the coal rate involved in this case will so decrease the intra state earnings of the several railroads that they cannot make a reasonable profit on the value of the property which may fairly be considered as employed in their purely intra state business. Indeed, such a contention could not successfully be made in the light of the record in this case even though all of the elements necessary to the determination of such a question were before the Court. On the contention of the defendants, the loss per ton per mile for transporting coal under the legislative rate here involved is less than two mills. This would constitute a loss so small compared with the volume of the entire business done within the state that the loss could produce no appreciable affect upon the amount of net profits. But no one of the elements essential to prove that the effect of the rate is to reduce the net profits below a reasonable amount is established in this case. There is no evidence as to the gross receipts from purely intra state business; no evidence as to the gross expense properly chargeable to such business; and no proof of the value of the property which may be fairly said to be engaged in the carrying on of such business. It therefore stands admitted upon this record that despite the rate in question, these defendants can earn at least a fair profit upon their purely intra state business. The burden of proof is upon the de-

defendants to show that the rate involved will cut down the net earnings of the railroad from purely intra state business below the point of a fair profit. By failing to produce any evidence or even to make any claim on this point, the defendants stand before the Court admitting that their constitutional right to earn a fair profit on their North Dakota business has in no manner been affected. Indeed, so far as this Court knows each of the defendants may be able to earn ten or twenty per cent. despite the rate in question.

Said this Court in Minneapolis, etc. *Railway Co.* vs. *Minnesota*, 186 U. S., 257: "It may well be that the existing rates upon other merchandise which are not disturbed by the Commission may be sufficient to earn *a large profit* to the company though it may earn little or *nothing* upon coal in carload lots."

If the principle contended for by the defendants be sound, it would apply with equal force notwithstanding the fact that it appeared upon this record that each of the railroads involved would under the rate in question earn twenty-five per cent. upon the fair value of the property employed in the purely intra state business. The contention of counsel for the defense, therefore, is that every railroad company in the United States has a two-fold constitutional right—first,, to earn a fair income upon the value of the property; and second, to draw a line of demarcation between freight and passenger traffic, and then to divide and subdivide and re-subdivide the freight traffic, and insist that it shall be allowed to earn upon every commodity transported the cost of transporting the same, and in addition such an amount in excess that the aggregate of such excesses on all the commodities will constitute a fair income upon the value of the property.

This pursuit of the transportation business into its minutest ramifications calls to mind the vain effort of the

metaphysician who sought to "sever and divide a hair 'twixt north and northwest side." The constitutional right here contended for is so attenuated that it has reached the vanishing point. It is a mere phantom and to establish the invasion of it, the defendants bring before this Court a chain of so-called evidence some of whose links are mere guesses and conjectures, while others of them are wholly missing.

In determining whether the constitutional right of a railroad company has been invaded by a rate law, under which its earning power has been cut down, the transportation business carried on by it must be treated as a *unit*. True it is that a line of demarcation must of necessity be drawn between interstate and purely intra state business. But this division of the business of the entire system is compelled by the nature of the case. Each state has the exclusive right to prescribe rates for itself, but for no other state, and the nation has the exclusive right to fix rates for the interstate branch of the business. But insofar as the business involved is within the power of the particular sovereign which has prescribed rates for transportation, all of the business within the power of that sovereign must be treated as a *unit*, and if, upon all that business, a reasonable profit is being earned, the constitutional right of the railroad company and its stockholders, so far as the *beneficial enjoyment* of the property is concerned, has not been invaded.

The defendants in this case are not engaged in the business of carrying coal nor have the stockholders invested their money in any such business. The defendants, and in the background, the stockholders, are engaged in the general transportation business in North Dakota, embracing all kinds of freight and passenger traffic. Their capital is invested in this general business and their constitutional right so far as their equitable title is concerned is merely to have this general business earn a fair income upon the capital.

The doctrine contended for is not essential to the full protection of the property rights of railroad companies for it proceeds upon the express ground that every rate that is not remunerative is illegal, although the company may be earning a handsome income upon its entire business. It may be well to consider the wilderness through which the courts of the land must wander in their vain effort to ascertain whether a given rate is or is not remunerative. It is impossible to determine with mathematical accuracy the cost of transporting a ton of any commodity a mile. This is squarely admitted by President Elliot. He says:

> "I never have claimed and do not now claim that I could go to work and tell you or anybody else what the absolute cost was of moving a given ton of freight a given distance." (Page 73, Record.)

At the very threshold of the investigation of this question lies the first classification, to-wit: the expense of the freight traffic on the one hand, and the expenses of the passenger traffic on the other. With respect to certain items these expenses can be ascertained in dollars and cents from the books of the company; but with respect to many of the items which relate to both kinds of traffic, such, for instance, as the maintenance of the road bed and structures, it is impossible to determine how much of these expenses which are a part of the operating expenses, shall be charged up to the freight traffic and how much to the passenger traffic. This is fully explained and frankly admitted by President Elliot in his evidence. (Pages 70 to 74, Record.)

In apportioning these expenses, which are called "*indivisible*" expenses, the railroad companies are compelled to adopt some purely arbitrary basis. President Elliot says: "*There is an arbitrary basis adopted.*" (Page 71, Record.) By using this basis it is possible to reach a result, but it is as arbitrary as the basis behind it. In this way it is possible

to *conjecture* what it costs in dollars and cents to carry on the freight business of the entire system. By dividing this sum of money by the number of tons of freight per mile carried by the entire system it is possible to obtain the average theoretical cost of carrying a ton of freight a mile. But this average cost has in it all of the possible errors growing out of the employment of the purely arbitrary standard already referred to.

The next step in the demonstration is to differentiate the purely local business within the particular state from all other business and show how much more the average cost per ton per mile is for carrying such freight than the general average for all freight. Here again we are in the realm of speculation, dealing with matters resting wholly in opinion and never susceptible of any accurate knowledge.

Having ascertained the average conjectured cost of purely local business another step in the dark must be taken, namely: the particular commodity whose rate is involved must be differentiated from the miscellaneous freight, for it is a matter of common knowledge that there is a marked difference in the cost of carrying different articles by railroad companies; and into this problem enter so many elements that the conclusion when reached is the merest surmise. Here again we encounter the field of conjecture, no positive knowledge on the subject ever being possible. And what does this discussion disclose? Merely this: that the Court is called upon in this case to create a *phantom* constitutional right hitherto unknown, with the certainty before it that every time this phantom right is invoked against the rate making power, the judicial investigation of that question will necessarily lie across the quagmires and morasses of arbitrary classifications and of guesses and surmises of experts.

Nay, the situation is still worse. The logic of defendant's

contention necessarily leads to the conclusion that this constitutional right is that the rate on each commodity must equal the cost of transporting that commodity, *and something in addition*, in order that the particular rate may be remunerative. Counsel for defendants frankly admit this. In their brief in the Supreme Court of North Dakota they say that the rate in qustion will not in fact pay operating expenses, "saying nothing about *a proportionate return* for interest upon the carriers' investment." In other words, each commodity rate must bear the burden of transporting that commodity *and something besides*. What shall that "something besides" be on each rate so that the aggregate will be a fair, and only a fair income upon the value of the property? While the railroads have the right to earn such fair income, the public also have the right to insist that the income shall not exceed such a fair income; and therefore they have the right to insist that the aggregate of the excess with respect to all the commodities transported above the expense of transporting such commodities shall not constitute more than a fair revenue. It consequently follows, that with respect to every commodity the courts will be called upon to decide whether the excess is too little; and the legislature or railroad commission will be called upon to decide whether with respect to the particular commodity the excess is just sufficient, in connection with the excess as to other rates, to make only a fair revenue for the railroad company. The fact that the rate involved in this case relates to only one commodity, and that that rate is found in a law by itself, in no manner affects the principle involved. If every railroad company has the right to have the rate with respect to every commodity pay the expense of transporting it, and something besides, then it is wholly immaterial whether the rate attacked is embodied in a law by itself, or whether it is found in a general rate law. The position of defendant's counsel would be precisely as strong

as it is in the case at bar if the rate law in question had also embodied within it every existing rate in force in North Dakota at the time it was enacted, for the question is and always must be, if counsel for defendants be correct, whether the particular rate attacked is or is not remunerative. What will be the consequence of such a doctrine in embarrassing the exercise of the rate making power of the sovereign? It will be this. In fixing every rate it will be known in advance that it must run the gauntlet of special attack by astute railroad counsel backed up by astute railroad experts, who not being required to deal with certainties, can give full swing to their fancy, and this too with but little hope that experts outside railroad circles can be found to challenge the accuracy of their testimony. Every time a rate law is framed or rates are prescribed by a commission, the body undertaking the work will be confronted with the danger that a number of the rates prescribed may be shown by guesses and conjectures to be unremunerative, and this will inevitably constitute a serious obstacle in bringing each rate down to the lowest possible basis consistent with a fair income to the railroad company. The likelihood of overstepping the line according to the future surmises and guesses of experts will have a tendency to make those engaged in such work fearful of such results, for to cut out of a rate law by judicial decision a number of important rates may so emasculate the bill as to render it of little value. The courts cannot make or modify a rate, and when one is destroyed in this way the whole task must be done over again.

Another aspect of this question must not be ignored. If, in a statute embracing fifty commodities, the rate on ten should be found to be unremunerative upon the theory developed in this case, the whole law would be destroyed, for a rate law is necessarily an entirety, the different rates being adjusted to each other, the amount of each being fixed with reference to the amount of every other. The court, which

should expunge ten of the rates from such a law, would not be able to see that the legislature would have adopted the other forty rates if it had known that the ten rates which have been nullified would remain as before the law was passed.

This Court has recently stated in the clearest manner that the utmost scope of previous rate decisions has been merely this, namely: That the sovereign can not so regulate rates as to take away the ability of the railroad company to earn a fair profit on the transportation business as a whole, either state or interstate. In *Atlantic C. L. R. Co.* against *N. C. Corp. Com.*—206 U. S. 1—this Court said:

> "The contention is that the fact that some loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the unreasonableness of the order and demonstrates that to give it effect would constitute a taking of property without due process of law, in violation of the 14th Amendment. Conclusive support for this contention, it is insisted, is afforded by the doctrine upheld in *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed 810, 18 Sup. Ct. Rep. 418, and the cases which preceded that decision. The cases relied upon, however, only involved whether a general scheme of maximum rates imposed by state authority prevented the railroads from earning a reasonable compensation, taking into view all proper considerations as to the value of the property and the cost of operation, and, if so, whether the enforcement of rates so unreasonably low would be unjust and unreasonable, and, therefore, be confiscation, —that is, a taking of property without due process of law, in violation of the Constitution of the United States."

POINT II.

We desire to call the Court's attention to the fact that in the vain quest after the truth as to what it costs to carry a

ton of a given commodity a mile, the chain of evidence in the demonstration is not merely as weak as the weakest link, but is as weak as the combined weakness of all. The weakness of each link augments that of the other links. As you proceed in the investigation it is indeed a crescendo of weakness. If in arbitrarily apportioning the individual expenses between freight and passenger traffic too large a share is apportioned to the freight traffic, this increases erroneously the cost per ton per mile for transporting freight. If in differentiating the expense of hauling local freight from the expense of hauling all freight, a mistake is made, and too high a figure is fixed as the increased cost of the short haul over the average cost of the long and short hauls combined, then again the cost of carrying a ton of freight in the state a mile will be overestimated; and a like error may be made in taking the step from the general average of the cost of transporting all freight in the state to the cost with respect to the particular commodity the rate of which is involved.

But it was said in the brief filed in the State Supreme Court that inasmuch as it appears that the rate in defendants are earning a fair profit, it must be that some of the other rates are unreasonably high; and in that connection it was urged before the Supreme Court of North Dakota that the courts will not sanction the robbing of Peter to pay Paul. This solicitude of defendants for their unfortunate victims might impress this Court more favorably were it not for the fact that it necessarily presupposes that they have been engaged in, and are perpetuating the robbery which they invoke as a sword of attack against the rate law in question. These other rates which are not involved in this case are either established by the roads themselves or by the state, or partly by the roads and partly by the state. If established by the railroads themselves, no court of justice will permit them to derive an ample revenue from excessive rates, and then because they are doing this, destroy a

particular rate law that they may make a reasonable profit out of such a rate in addition to their excessive profits out of other rates. This Court said in *Wilcox* vs. *Consolidated Gas Co., 212 U. S. 19,* at page 54:

> "Lastly it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given. But neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether by the reduced price to the city, the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand."

If on the other hand, the rates in existence at the time this law went into effect were established by authority of the state, that finally ends the question so far as the railroads are concerned, unless they can show that the rates as a whole are unremunerative. The railroad companies cannot complain in court that certain legislative rates are excessively high as a basis for destroying particular rates which are claimed to be unremunerative. Indeed, the citizen cannot attack in court any rate fixed by the sovereign on the ground that it is excessively high. So far as the public are concerned, and the rate making power of the state is concerned, the railroads of the country are public highways, and the Federal constitution contains no guaranty with respect to the terms on which the citizens of each state shall use the highways within each state so far as such use does not involve interstate commerce. It is competent for the sovereign power to discriminate between different commodities and prescribe such rates for transportation as it sees fit; and the determination of the question by the state is a final determination that the particular rate is a reasonable rate as against the claim of the citizen or the carrier that it is too high. Care must be taken to discriminate between the functions

of the courts on the one hand and the functions of legislative bodies, and state and national commissions on the other hand in dealing with the question of reasonable rates. Undoubtedly the legislature or the commission to which the power has been delegated may take many things into question in determining whether a particular rate is reasonable with respect to the citizen, and also with respect to the railroad company. Before such a body, the argument that the rate is excessively high or that it is unremunerative may properly be made, and should be considered along with other elements that enter into the question. Such a body may deal with the matter as a business question. But the courts can consider the reasonableness of rates from only two standpoints—whether despite the rates fixed the company is able to earn a fair income upon its investment and whether the rate is so arbitrary as to amount to an illegal interference with the management of the business of the railroad company. If, then, the rates not involved in this case are too high, the defendants are estopped from raising the point for the purpose of destroying this law if they themselves created these rates; and if these rates have been created by the state, the question as to their being too high is, so far as judicial inquiry is concerned, forever set at rest both as against the defendants and as against the public. One of the troubles with this fanciful argument is that it ignores the fact that it cannot be demonstrated in this case that Peter is being robbed to pay Paul, for it is impossible to determine from this record with that certainty which should be required before a rate law is destroyed, whether the other commodities are bearing too heavy a burden for transportation charges and whether coal under the rate law in question will not bear a burden sufficient to pay the expenses of transportation. Moreover, the case is not one of a collision between Peter and Paul. It is not a case of a

heavy burden being laid upon the shipper of flour and a light burden laid upon the shipper of coal. It is well known that in the last analysis the burden of transportation charges in the main falls upon the consumer. It is because the shipper is obliged to add such charges to the price of his commodity that secret rebating was so deadly in its effect upon the competitor who was not the recipient of such favors. Being compelled to add a heavier transportation charge to the cost of his commodity he was obliged to enter a distant market at a disadvantage when compared with the shipper who was obliged to add only a smaller charge for transportation to the cost of his commodity. The case really presents the expression by the State of North Dakota of its belief in the policy of enlarging the local market for local coal by reducing the price of coal to the consumer through cutting down the transportation charge; and by such means developing one of the great natural resources of the state. In the last analysis the purchaser of a barrel of flour and of a ton of coal pays the freight; and of course the only effect of an excessive rate on flour and a lower rate on coal is that in the final result the public have to pay more for their flour and less for their coal. This expression—robbing Peter to pay Paul—is borrowed by counsel for the defendants from the opinion of Judge Brewer, now Mr. Justice Brewer, in the case of *Chicago, etc., Ry. Co.* vs. *Dey*, 35 Fed. 866. But this language as employed in that case has not the slightest relevancy to the case at bar. It was employed in connection with the argument that confiscatory rates in one state cannot be justified because the business of the whole railroad in all states, including the interstate business, was earning a fair profit. Said Judge Brewer in this connection:

> "Again it is said that this complainant's road runs through other states. These states may impose no

schedule of rates. Part of its business is interstate and only congress can limit that, so that from the business elsewhere revenues may be earned which will enable it to make up any deficiency in this state. But the invalidity of this schedule does not depend upon legislation or action elsewhere. If this schedule may be put in force here, a similar one may be in Illinois, Minnesota, and other states through which the company's railroad runs. *For some purposes its property in this state is separate and distinct from its property elsewhere, and out of this property in this state it is entitled to receive some compensation.* Robbing Peter to pay Paul has never received judicial sanction."

The distinction between that case and the one at bar is too obvious to need comment. Counsel might have continued their quotation from this opinion and found matter there not so helpful to their contention at the present time. In this same opinion Judge Brewer says:

> "Coming now to the question of the schedule as presented, I remark that the schedule as a whole must control, *and its validity or invalidity does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation.*"

Elementary principles absolutely control this case. The railroad business is a copartnership between private and public interests. With respect to certain matters the private interests are dominant; with respect to certain other matters the public interests are dominant. So long as the railroads are in private hands, the direct management thereof cannot be taken from them and placed in the hands of the public; that is to say, the right of direct management of the business by the railroad company is a dominant right and cannot be arbitrarily interfered with. So also is the right to be exempt from such rate regulation as will impair the right to make a fair profit upon the investment. Neither of these rights are affected by the law in question. In all other

respects, the public constitute the dominant partner in this business, and may proceed with a free hand so long as they keep withi nthe scope of legitimate control. In other words, when a rate is involved, the sole questions are whether it affects the ability of the corporation to derive a reasonable income from its property and whether it is purely arbitrary in character. If these questions are answered in the negative, then the power of the public becomes dominant and cannot be challenged on the ground that the particular rate is shown to be unremunerative. The authorities on this subject seem to have settled the law against the contention of counsel for the defendants.

In *St. Louis Railway Co.* vs. *Gill*, 156 U. S., 649, this Court said:

> "It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety, even in the State of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway Company and extending from the northern boundary of Arkansas to Fayettville in said state. In this state of facts, we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect: That the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the

earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas."

Said the Supreme Court of North Dakota in the case at bar of the foregoing decision:

> "Upon parity of reasoning it would seem that the carrier may not be permitted to single out one commodity and insist that the tariff of rates for the transportation of the same is unreasonable and confiscatory without being required to show that under the operation of such rates it will be unable to derive from its entire freight business within the state a just and reasonable profit."

In *Minneapolis & St. Louis Railway Company* vs. *Minnesota*, 186 U. S. 257, this Court said:

> "Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little *or nothing upon coal in carload lots*. In *Smyth vs. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, we expressed the opinion (p. 541, L. ed. 847, Sup. Ct. Rep. 432) that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to per-

mit this to be done is expressly reserved to the Interstate Commerce Commission by section 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the commission may compel such reductions, *we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular.* As we said in *Smyth* vs. *Ames*, (p. 547, L. ed. 849, Sup. Ct. Rep. 434): 'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'"

In the Nebraska case, *Smyth* vs. *Ames*, 169 U. S. 456, this Court said:

> "The argument that a railroad line is an entirety, that its income goes into and its expenses are provided for out of a common fund, and that its capitalization is on its entire line within and without the state, can have no application where the state is without authority over rates on the entire line, and can only dea with ocal rates, and make such regulations as are necessary to give just compensation on local business."

This language contains the pith of the whole matter, to-wit: that while the argument that the railroad business is a unit, when rate regulation is being considered, is sound as a general proposition, it can have no application to those rates which are wholly beyond the control of the state, to-wit: interstate rates. The implication from this language is that in all other respects, in determining whether the rate is reasonable, the business of the road must be treated as a

unit; that is to say, all of the intrastate business must be considered, *and not a detached rate.* In this same case this Court said:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Does this mean that what a railroad is entitled to ask is both this and something more; in a word, that it can claim a fair return upon its investment, and also that the rate as to each commodity shall be remunerative? The language of this Court in *Willcox* vs. *Consolidated Gas Co.*, 212 U. S., 19, page 54, is decisive of this question. This Court said:

> "We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale so to speak would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. *So long as the total is enough to furnish such return, it is not important that with relation to some customers the price is not enough.*"

As sustaining this proposition, this Court cites two railroad cases, to-wit: *Minneapolis, etc. Ry. Co.* vs. *Minnesota*, 186 U. S., 257, and *Atlantic Coast Line* vs. *North Carolina* Commission, 206 U. S., 1. It is therefore obvious that this Court in the Wilcox case has laid down the proposition that if the rates as a whole are remunerative, the fact that a particular rate is unremunerative is wholly immaterial, and it cites the two railroad cases referred to as sustaining this proposition. In other words, this Court has placed upon these two decisions the construction that they in effect sustain the doctrine that a particular railroad rate cannot be destroyed as unremunerative so long as the business as a whole is being conducted at a profit. The fact that the Willcox case relates to a gas company and not a railroad

company is wholly immaterial. By citing the two railroad cases in the opinion, the Court emphatically recognizes the proposition that the underlying principle is the same so far as rate regulation is concerned, whether the sovereign is regulating the rates of public transportation of freight and passengers or the rates of a corporation engaged in the public business of furnishing gas. On principle, the right of control and its limitations are identical in both classes of cases. Indeed, this Court in *San Diego Land & Town Co.* vs. *National City*, 174 U. S., 750, in so many words declared that the question was the same whether the rate regulated was that of a railroad company or of a corporation discharging a public function within a city in the way of supplying the public with water or gas. Said the Court in this case:

> "What elements are involved in the general inquiries as to the reasonableness of rates established by law for the use of property by the public? This question received much consideration in *Smyth* vs. *Ames* above cited. This case, it is true, related to rates established by a statute of Nebraska for railroad companies doing business in this state. But the principles involved in such a case are applicable to the present case."

This Court further said in the Willcox case:

> "The only interest of the complainant in the question is to find out whether by the reduced price to the city the complainant is, upon the whole, unable to realize a return sufficient to comply with what it has a right to demand."

This language was used by this Court in answer to the contention that the rate to the city was too low.

In *Matthews* vs. *Board of Corporation Commissioners*, 106 Fed. 7, Circuit Judge Simonton said, at page 10:

> "In this connection it must be borne in mind that the Supreme Court of the United States in deciding

whether the rates fixed under legislative authority violated the 14th amendment, do not rest their judgment on one set of rates for specific articles, but they take into consideration all the rates on all artices, and decide whether as a whole the result is unreasonable."

In *Southern Ry. Co.* vs. *McNeill*, 155 Federal Reporter, 756, Circuit Judge Pritchard says, at page 787:

> "While a railroad is not entitled to earn a profit on every mile of its road, *nor upon every article carried by it*, nevertheless it is entitled to earn a reasonable profit upon the entire intrastate business in the state."

In *Perkins* vs. *N. P. Ry. Co.*, 155 Federal, 445, District Judge Lochren laid down the proposition that in determining the legality of a rate or rates, each law must be tested solely with reference to all existing rates at the time it went into effect. At page 449 he says:

> "For instance, the order of the commissioners of Sept. 6th, 1906, which went into effect on November 15th of the same year, must be considered by itself upon the charge that it did not afford adequate compensation to the railroad companies and had the effect of confiscating their property. If it did not have that effect, it would not have that effect if the subsequent acts added to it had that effect. And so with the act revenues of the companies to a degree which would leave them without sufficient compensation, even after the reducing effect of the order of the commissioners, then that would not be unconstitutional; it would be constitutional and proper. And the same remarks would apply to the act of April 18th, which affected the rates chargeable upon commodities. It would have to be considered, of course, with reference to the reductions theretofore made by the two previous acts; but if that still eft enough to compensate the railway companies for their services rendered in the transportation, and left an adequate return upon the value of the property which was used in the transportation within the state, the complainants would have no cause

for complaint. But, of course, the latter act must be considered with reference to the reductions made in the earlier order and the earlier act."

In re *Ark. Railroad Rates*—168 Fed 720—the Court said:

"Besides, it is well settled that for the purpose of determining whether rates are confiscatory or not all sources of revenue must be considered. *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; *Seaboard Air Line Co.* v. *Forida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933.

"The increased earnings from one class of traffic will, therefore, justify a corresponding decrease in another class, if the net earnings from all sources are compensatory. For this reason, if the net earnings on passenger traffic are larger that fact would be considered in determining whether the freight tariffs fixed by the complainants are too high, and also aid in determining what they should be. It is true that lower passenger rates are felt more generally, and for this reason are more fully appreciated by the large majority of the public than lower freight rates, which are not felt so readily by the consumer, the same as the collection of direct and indirect taxes. But so far as the interests of the public at large are concerned, it is of much more importance to them to enjoy the benefit of lower freight rates than passenger rates, provided the latter are not excessive or unreasonable. High freight tariffs not only directly affect the prices of commodities to the consumer, but may seriously cripple, if not totally destroy, manufacturing industries and the business of wholesale dealers, if higher than those charged from competitive points outside the state, as it is the price at the place of delivery which will control the trade."

In *Mo., K. & T. R. Co.* v. *Interstate C. C.*, 164 Fed. 645, the Circuit Court of Appeals of the 8th district said:

> "To be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable, for reasonable regard must be had for the value of the service to the public."

As enunciating the same principle, see *Southern Ry. Co.* vs. *Atlanta Stove Works*, 57 S. E., 429.

Railway Co. vs. *Smith*, 60 Ark. 221.

Morgan's L. & T. R. & S. S. Co. vs. *Railroad Commission*, 109 Louisiana, 247.

People vs. *St. Louis, A. & T. H. R. R. Co.*, 176 Ill. 512.

Union Traction Co. vs. *Chicago*, 199 Ill. 579.

POINT III.

Another principle laid down in the Willcox case is applicable. It is stated in the following language:

> "But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunctions before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions as opposed to facts."

In the case at bar, the evidence, even on defendant's own theory, merely tends to show a trifling excess of cost of transportation above the rate, and this evidence relates to

the transportation of coal as it has heretofore taken place in carload lots. Unquestionably the transportation of the coal in train load lots would reduce the cost of transportation, and who knows what effect in the way of stimulating the business so that the coal may be transported in train load lots the reduced rate may have upon the business. Besides, increasing the density of traffic does not increase the expenses in proportion.

In other words, upon the contention of defendants themselves, the case is one where, in conformity with the doctrine of this Court in the Willcox case, a railroad should put the rate involved in force, and in the light of experience see whether the rate is not remunerative after a reasonable time has elapsed for the rate to produce its effect in the way of stimulating the development of the local coal business. Less injustice would result from applying such a doctrine to this case than to the Willcox case, for here it is undisputed that the defendants might carry a vastly larger amount of coal under the rate in question than they have been transporting in the past without affecting their ability to earn a fair profit on their intra-state business.

POINT IV.

We do not claim that the reasonableness of a single rate may never be inquired into. Neither do we contend that a single rate may not be overthrown, although the railroad company is earning a fair profit on its business as a whole. What we do claim is that there is a plain distinction between the *ground* of attack of a body of rates as a whole on the theory that they destroy the power of the company to make a fair profit on the one hand, and the grounds of attack upon a single rate when it is conceded that the company, despite such rate, is earning a fair profit, on the other hand. When a body of rates as a whole are attacked on the ground

that they take away the power of the company to derive a fair income from its business, or when a single rate is attacked on the ground that the reduction in the rate in connection with other rates, reduces the earning capacity of the company below a fair profit, the single question presented to the court is whether the rates, or rate, as the case may be, affect the earning power of the company so much that it cannot make its business reasonably profitable. But when a single rate is attacked on the ground that it is not a reasonable rate, the question whether the rate is equal to the cost of the service *is only one of the factors in the problem*, and by no means a controlling factor under all circumstances.

In *Illinois Central Railroad Company* vs. *Interstate Commerce Commission*, 206 U. S. 441, this Court affirmed the decree of the Circuit Court, which enforced an order of the Interstate Commerce Commission requiring certain carriers to desist from charging an increased rate on lumber. In the statement of facts by Mr. Justice McKenna, we find the Interstate Commerce Commission pointing out the distinction which we have just made. In his statement of facts, Mr. Justice McKenna says:

> "The Commission thought that the elements to be considered in determining the reasonableness of the entire system of rates were widely variant from those to be considered in determining the reasonableness of a single rate, and expressed the elements upon which the latter depends to be the value, volume, and other characteristics affecting the transportation of the particular commodity to which it is applied."

The Commission, as appears from this statement of facts, also expressed its opinion strongly against the principe that the cost of service to the railroad company should control. Referring to the viePw of the Commission in this respect, Mr. Justice McKenna further says in his statement of facts:

"In answering the contention that the former rate was not adequately remunerative, the Commission expressed the view that reasonableness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty. And, further, that the value of the entire property of a railroad can shed but little if any light upon the question. The rate on one article might reasonably or unreasonably be high, and the total of rates be remunerative, or otherwise."

The language of the Commission in this case (*Central Yellow Pine Asso.* vs. *Illinois C. R. Co., et al*, 10 I. C. C. C. Rep., 537-539) is as follows as far as this point is concerned:

"But it is further contended on behalf of the defendants that lumber, considering its character and all the conditions incident to the services rendered in its transportation, was not, at the 14-cent rate in force at the date of the advance, yielding its proper proportion of the revenue required by the defendants to meet their expenses—in other words, that the rate as applied to lumber was not a reasonable rate, viewed from the carrier's standpoint, in that it was not adequately remunerative. The question of the reasonableness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty.

"In *Smyth* vs. *Ames* (Nebraska Freight Rate Case, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418), there was involved an entire system of rates applicable to all traffic on the roads in the state of Nebraska and not the rate on a single commodity or article of traffic. In that case the Supreme Court held that the carrier is entitled to earn 'a fair return upon the value of that which it employs for the public convenience.'

"The value of the entire property of a road employed for the public convenience can shed but little, if any, light upon the question whether the rate on a single among thousands of articles of traffic yields its proper proportion of a fair return on that value. The rate on one article of traffic may be reasonably high and the

carrier fail to earn a fair return on the value of the entire property empoyed for the public convenience because of unreasonably low rates on other traffic, and, vice versa, the rate on one article of traffic may be unremunerative or unreasonably low and the return to the carrier from its entire business may be fair or reasonably high, the deficiency under the rate on the one article of traffic being made up by the rates on the balance of the traffic. * * * * It has not named any as shedding light upon the reasonableness of a rate on a single commodity like lumber. It is evident that such elements are widely variant in the two cases. Where an entire system of rates is involved, the principal, if not the only question, is, whether the revenue yielded by the rates on all traffic is a fair return on the value of that which is 'employed for the public convenience'—a question, the determination of which, as we have shown, can have only a very remote, if any practical bearing on the reasonableness of a rate on a single article is in issue, the question (which could not arise in the former case) whether the rate is unjustly discriminatory or unduly preferential, may be presented, and the reasonableness of the rate depends upon the value, volume and other characteristics affecting the transportation of the particular commodity to which it is applied."

In *Interstate Commerce Commission* vs. *Chicago Great Western Railway Co.*, 141 Fed. 1003, District Judge Bethea, at page 1015, thus deals with the question of the reasonableness of a single rate:

"A careful examination of the opinions of that court, as well as the evidence taken in these cases, shows that there are a great many factors and circumstances to be considered in fixing a rate. Among other things, the vaue of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method when not interfered with by competition or other factors. It includes the theory so strenuously contended for by

petitioner to the Commission and its attorneys, of making a finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation." (Citing cases.)

He further says:

"The cost of the service to the carrier would be an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however."

He further states as another element to be considered:

"General pubic good, including good to the shipper, the railroad company, and the different localities."

He then adds:

"None of the above factors alone are considered necessarily controlling by the authorities. Neither are they controlling as a matter of law. *It is a question of fact to be decided by the proper tribunal in each case as to what is controlling.*"

The reason why the cost of service is not controlling where a singe rate is involved is two-fold. First, the impossibility of determining such cost of service with anything like accuracy. Second, there is no injury to the *equitable* title of the carrier as it is allowed on the whole to earn a fair profit on the investment in the business. Other elements may make the rate a reasonable one though less than even theoretic cost of service. For instance, it may be entirely reasonable for the state to put in force a low rate on coal for the purpose of developing a great natural resource by stimulating the purchase of local coal in place of foreign coal through the reduction in the cost of the former. The *equitable* title of the carrier is not affected since it is allowed to derive a fair profit from its business as a whole. The legal title of the carrier is in no manner affected because the legal rate, in view of all the circumstances, is reasonable,

and to this extent, the legal title of the carrier is subject to public control. If a carrier should be required to carry coal for nothing, or what would be practically the same thing—a ton of coal a hundred miles for a cent, the rate would be illegal, on the ground that the law was *in no true sense a regulation of the rate.* There is no such case before this Court. The rate, even on the theory of the defendants, bears a very substantial relation to the cost of service. Nor is the revenue from it small in dollars and cents. On every ton of coal carried 100 miles, the rate is 61 cents per ton. At the rate of thirty tons to the car, this would make a gross revenue of $18.00 for carrying the car 100 miles. And, of course, the other rates are in proportion, according to the distance of transportation.

The basis of an attack upon a single rate on the ground of unreasonableness is that a rate which is unreasonable in the light of *all the elements* bearing on the question, is not a lawful regulation of the business of a carrier, *and is therefore a direct invasion of its legal title to the property, because it is unwarranted interference with the control of its business.*

Said this Court in *Lake Shore etc. Railway Company* vs. *Smith*, 173 U. S., 684:

> "We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations."

It is upon this particular ground that the decision in the case just cited was founded. It was the case of an attempt on the part of the state to compel a railroad company to discriminate between persons in the making of passenger rates. Said the court in that case, speaking of the power of the legislature:

> "But it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of

such persons or classes as in the legislative judgment or caprice may seem proper."

This Court further said in that case:

"It is purely a bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the single decision of the legislature should be held to constitute such reason."

Speaking of the decision in this case this Court in *Wisconsin, etc., R. Co.* vs. *Jacobson*, 179 U. S. 287, pointed out the above quoted portion of the opinion as containing the pith of the decision. See pages 301-302.

And yet the Smith case was cited in the State Supreme Court by counsel for defendants in this case as an authority in their favor. It has not even the remotest bearing on the question whether a single rate can be adjudged to be unreasonable upon the single ground that it is less than the theoretic cost of service. The decision of Judge Brewer, now Mr. Justice Brewer, in *Chicago etc. Ry. Co.* vs. *Becker*, 35 Fed. 883, is plainly distinguishable from the case at bar upon the grounds already stated. It was a case where there was not the slightest doubt as to the actual cost of service—the problem being an exceedingly simple one; nor was there the least doubt that the rate for the service—which was a switching service, was less than the cost thereof. There was no reason urged why such service should be performed at less than cost, and therefore the court held that the cost of service became a controlling

factor as bearing upon the question of reasonableness. Such a case is widely different from a case like the one at bar where the fact that the rate is less than the cost of service is by no means clearly established, and where a good reason can be presented, to-wit: a reason of vital state policy in the development of a great natural resource, that in the classification of rates, an especially low rate should be made with respect to a particular commodity.

The rate in question is not unreasonable in the sense that it attacks the beneficial enjoyment of, or in other words, the *equitable* title of the defendants to, their respective railroad properties by taking away the power to derive a fair income therefrom. Neither is it an attack upon the right of control of *legal* title, because such right of control is subject to the public power of regulation, and the rates in question are reasonable when all of the elements which properly enter into the question rae considered.

In determining whether a particular rate is reasonable the inquiry of the Court is more restricted than that of the Interstate Commerce Commission or a State Railroad Commission. As a matter of administrative policy such a Commission might, on complaint, hold that a reduction of a given rate requested by parties interested, would be unreasonable; and yet if such reduction was made by such Commission, or if Congress or a State Legislature should reduce such rate, it would by no means follow that the Courts would adjudge it to be unreasonably low. The question is not what this Court, acting as a regulating body, would do in the premises, but whether the rate is so low as to constitute a purely arbitrary interference with the management of the railroad business to that extent, an dhence an unconstitutional interference with its *legal* title to its property. Said this Court in *Atlantic C. L. R. Co.* v. *N. C. Corp. Com.*, 206 U. S. 1:

"In coming to consider the question just stated, it must be borne in mind that a Court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised *to so unwarranted degree as in substance and effect to exceed regulation* and to be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws."

POINT V.

Defendants wholly failed in their attempt to shaw that the rate in question would not pay the cost of transportation. Their whole case rests upon a comparison between the average revenue per ton per mile under the rate in question, and the cost of transporting a ton o fcoal a mile within the state. To ascertain such cost, they were compelled to rely upon a process of demonstration, in the course of which, as we have already shown, there was a purely arbitrary classification and the opinions of experts. The pathway of such a demonstration is so beset with uncertainties that the Court should at least require the defendants to start from *knowen data. But so far as the item of expense is concerned, there is no knowen data save the gross expenses of the entire system for both freight and passenger traffic, and for all state and interstate transportation.* Because of the fact that many of the items of expense called "indivisible" expenses are common to both classes of traffic, it is impossible to fix in dollars and cents the cost of freight traffic and the cost of passenger traffic respectively. And because the same trains carrying freight and passengers are engaged in both state and interstate business, and for other reasons, it is impossible to determine the cost of purely intrastate traffic.

In *Northern Pacific Ry. Company* vs. *Keyes*, 91 Fed. 47, District Judge Amidon, Circuit Judge Thayer concurring, said, at page 53:

> "The income derived by the carrier from the business which it conducts within the state can be ascertained accurately from the records of the company, but the expense of doing that business is not susceptible of mathematical ascertainment. Many of its items apply equally to local and interstate business. The different kinds of traffic are often carried in the same train, and not infrequently in the same car. It is absolutely impossible to divide the cost of traffic thus moved, and say that this amount should be attributed to local business, and that amount to interstate. It is possible, however, to ascertain the relation of the cost of doing the entire business of the road to its gross income. These amounts are shown by the books of the company in dollars and cents, *and furnish the basis from which all investigations as to the cost of doing local business must start.*"

The case at bar is utterly without evidence as to either the gross earnings or the gross expenses of the *entire* business of the defendants respectively. Mr. Johnson, the Assistant Comptroller of the Northern Pacific Railway Company, merely presented a statement, Exhibit "C," which contained figures taken from the report by the company to the Railroad Commission of North Dakota for the fiscal year ending June 30, 1908.

Said this Court in *Seaboard Air Line* vs. *Florida*, 203 U. S. 268:

> "It may well be doubted whether a railroad company can rely, as evidence in its own behalf, upon a report made and filed by it."

The competency of such evidence was challenged by a timely objection (Page 52 of Record).

He does not testify that the figures contained in such

report are true to the best of his knowledge and belief, although he does so testify with respect to the other two exhibits, "A" and "B." From this report he finds the operating expenses with respect to all business in the State of North Dakota, both local and interstate, to be $5,603,704.28 (Page 98 of Record). But it is perfectly obvious that there is and can be no record of the company to which any one can go and ascertain in dollars and cents the expense of doing business in North Dakota, both local and interstate. The items are so blended with the business of the entire system that they cannot be separated in money with mathematical accuracy. These figures are, in the nature of the case, either a mere guess, or have been estimated by some method of computation. As to what that method is, the record is silent. Upon principle and in accordance with the opinion in the Keyes case already cited (91 Fed. 47), the only way to ascertain such expense is by first of all establishing a ratio between all expenses and all receipts of the entire system, and then determining by expert testimony whether that ratio should or should not apply to the business within the state, both local and interstate; and if the ratio should be different, how much the difference should be. Later on, in Exhibit "C," we have a ratio stated between receipts and expenses within North Dakota upon local and interstate business. The ratio is 58.414 per cent (Page 98 of Record). But it is evident that the ratio is determined by a comparison between the gross earnings in North Dakota, to-wit: $9,593,089.01, and the so-called operating expenses, $5,603,704.28. The trouble with this process of demonstration is that it *puts the cart before the horse*. It is illogical to deduce a ratio in this way, for before one can make any estimate of the expenses within a given state incurred in the carrying on of local and interstate transportation, it is necessary to start with a *known* ratio between expenses and receipts.

and the *only* known ratio is the ratio between the gross earnings and the gross expenses of the entire system. But the statement contained in Exhibit "C" shows that the ratio of expenses to earnings, to-wit: 58.414 per cent, is the ratio not of *all* expenses of the entire system to all earnings of the entire system, but, in the language of Exhibit "C," "the ratio of operating expenses for all business *in the state*." If the ratio of all expenses to all receipts of the entire system were shown to be fifty per cent, and the opinion of experts was to the effect that the ratio would be the same with respect to transportation, local and interstate, within North Dakota, then, by multiplying the gross earnings of traffic in North Dakota, which are susceptible of absolute knowledge in dollars and cents, with this ratio, some kind of an estimate of the expenses to be attributed to such traffic could be made. The earnings and the operating expenses set forth in Exhibit "C" simply relate to the local earnings and the local expenses in North Dakota on both local and interstate transportation. (Page 52, Record.) It is clear that in laying the foundation for the demonstration as to the cost per ton per mile for transportation, the very least the Northern Pacific Railway Company should be required to do would be to introduce some positive evidence showing the ratio of expenses to gross earnings upon the *entire system*. Neither in the figures in Exhibit "C" taken from the report to the North Dakota Commission, nor in th etestimony of the witness Johnson, have we any hint with respect to this matter, and the witness has not even testified that according to his best knowledge and belief the ratio in Exhibit "C" between expenses and receipts upon the traffic in North Dakota, local and interstate, is a correct ratio. All the witness says is that "*The report shows* that the ratio of operating expenses to earnings was 58.414 per cent of the gross earnings in the state of North Dakota." (Page 52, Record.) If this ratio is in point of fact incor-

rect and excessive, the error would run through the whole demonstration and augment the rate per ton per mile. Furthermore, the ratio so assumed by the witness to be correct applied to both freight and passenger traffic. And in the process of demonstration the witness then took a leap in the dark, as must always be done in such cases, and *assumed* that the ratio of cost to gross earnings for handling the freight business and the passenger business, respectively, was the same; that is to say, that it cost 58.414 per cent of the gross freight earnings and the same per cent of the gross passenger earnings in North Dakota to handle in North Dakota the local and interstate business. (Page 54, Record.) He does not even follow the custom of the railroad in applying the other equally arbitrary basis of train mileage in apportioning the expenses as between freight and passenger traffic. President Elliot testified, and so did the witness Johnson, that in apportioning the indivisible expenses, the Northern Pacific Railway Company adopts the policy of apportioning them according to train mileage basis; that is to say, that if all the passenger trains were operated the same number of miles over the entire system as all of the freight trains, the indivisible expenses would be divided in two, and one half attributed to the earning of freight receipts, and the other to the earning of passenger receipts. (Pages 53, 54, 70, 71, 72, 73, 74, Record.)

It is true that the witness Johnson endeavors to show that one arbitrary process leads to about the same result as the other. He does, however, admit that there is a difference, speaking of the difference in Exhibit "C" as *a fraction*. (Page 98, Record.) So far as this Court knows, that difference of a fraction may make the amount charged to the freight traffic greater than the other arbitrary system employed by the company, and this would

make the rate per ton per mile greater than if the arbitrary system followed by the railroad was adopted. We think that when a railroad company is attacking a rate, and is proceeding in the course of its demonstration by necessarily arbitrary apportionments of expenses, it should be required to follow the apportionment established by itself, and if it adopts another method, it should show that the result is precisely the same, or, if different, in what respect and to what extent it is different. Especially should this be done when it appears that all railroad companies that apportion their expenses at all do it on this basis and it is the basis followed by the Interstate Commerce Commission. (Pages 73, 74, Record.)

POINT VI.

Not only did the Northern Pacific Railway Company fail to lay the proper foundation for establishing the cost per ton per mile for carrying coal, but it also failed to supply the last and vital link in the chain of demonstration. The demonstration in the case at bar is like a bridge across a stream which is not attached to either shore. *It does not begin upon terra firma on one side, nor does it conduct us to terra firma on the other side.* All that the company claims it has demonstrated is the average cost of carrying a ton of miscellaneous freight a mile in North Dakota, upon the assumption that the average haul is a short haul of 87 miles. But another classification is absolutely essential before we can determine the cost of carrying a ton of *coal* a mile on the basis of such a haul. In this average cost enters all kinds of freight as we will demonstrate from the evidence at the end of this point. At the one extreme is freight, the cost of the transportation of which is heavy, and at the other extreme, bulky freight like coal in carload lots, which can be handled at a much lower cost. It is there-

fore plain that the average rate of cost per ton per mile of carrying miscellaneous freight in North Dakota an average haul of 87 miles, to-wit: 8.408 mills, sheds no light on the cost of carrying coal such an average haul; or rather it does shed light, *and such light is unfavorable to the contention of the defendants.* It is an unescapable conclusion that the cost of carrying coal is considerably less than the average cost of carrying all kinds of freight in North Dakota. How much less the case does not show, and yet the burden is as much upon the defendants to supply this link in the chain of demonstration as to supply any other link. It is to be noted that the conclusion of the defendants as to the average cost of carrying a ton of coal relates to the transportation of the coal wholly within the state. A large portion of the purely local transportation within the state of North Dakota is the transportation of freight in smaller packages, the expense of which is heavy compared with the transportation of coal in carload lots. The main part of the transportation of bulky freight in North Dakota, such as the transportation of grain out of, and of coal and lumber into the state or through the state, is interstate transportation; and the purely local transportation is made up largely of the freight in smaller packages, the expense of which is much heavier than the expense of transporting coal in carload lots. That coal in carload lots is a commodity requiring a comparatively small expense to transport is so well known that courts will take judicial notice of the fact. Said this Court in *Minneapolis, etc., R. Co.* vs. *Minnesota*, 186 U. S., 257:

> "It was shown that coal beongs to one of the lowest classes of freight."

In *Northern Pacific Ry. Co.* vs. *Keyes*, 91 Fed. 47, Judge Amidon said, at page 56:

> "But it must be remembered that the great volume of traffic carried by the complainants consists of heavy

articles like coal, lumber, grain and live stock, which are invariably moved at the lowest of all rates."

In *Chippewa Sugar Company* v. *M. & S. Pr. Co.*, 1 Wis. R. Com. Rep. 258, the Wisconsin Commission referring to sugar beets, a commodity which is handled in carload lots and is in this respect the same as coal, said:

> "The beets are not handled by the agent at either end of the haul. They are both loaded and unloaded by the shippers. All the agents have to do in the matter is to bill the cars at the shipping station and receive the way bill and take into account at the receiving station. The actual cost of handling an entire carload of beets is, therefore, less than the cost of handling a hundred pound package. For, to bill this package, and to take the way bill for it into the accounts, costs just as much as for a carload of beets. Besides this, the package must be checked in and out and handled through the warehouse or station at both ends of the haul, and this extra labor is entirely saved in the case of beets."

But no authority is required to sustain a proposition so elementary as this. Take two cars each carrying thirty tons the same distance and in the same train, one consisting of coal, and the other consisting of a hundred packages of merchandise. The biling of the coal is simple, only one bill of lading being required. And the book entries and auditing of the transaction at headquarters is likewise simple. Nor does the railroad have to perform any work connected with the loading or unloading of this kind of freight. The car is put on the side track for the consignor to load, and at its destination it is put upon the side track for the consignee to unload. So far as this kind of freight is concerned, there is no occasion for the company having and maintaining a freight house at the point of shipment or at the point of destination. But with respect to the merchandise of precisely the same weight in the next car, the case is wholly altered. The company receives such freight at

its freight house and is compelled to perform the labor of loading the same upon the car. When the destination is reached, it must there maintain a freight house to receive this freight temporarily, and must perform the work of unloading the car. Moreover, each of the packages must be weighed, and the weight transmitted to the proper clerk, and the rate of freight looked up and figured up, the money paid, and a bill of lading issued. At the point of destination of each separate shipment in the car it must be receipted for. These terminal expenses are included by the witness Johnson in figuring the cost of *conducting* transportation. (Page 58, Record.) At headquarters these hundred shipments involve a hundred times the work in making entries thereof and in auditing these items that the carload of coal does. And yet, it is gravely argued that the defendants have established the fair cost of transporting this commodity—coal, with respect to which the expense is comparatively light, by establishing the average cost of transporting a ton of miscellaneous freight a mile. Such average cost having for one of its factors a large amount of freight, the expense of handling which is very much larger than the expense of hauling coal, would the average cost of transporting the car of coal and the car containing the one hundred small packages be just the cost of carrying the coal alone?

In *Col. F. & I. Co.* vs. *So. Pac. Ry.*, 6 I. C. C. 489, the Interstate Commerce Commission said:

> "Rates on steel rails and other low grade freights of the character stated, yielding per ton per mile the average received on all freight would be unjust."

In the case of *Mpls. & St. Louis R. R. Co.* v. *Minn.* 186 U. S. 257 this Court held that it had no tendency to show that the rate on coal was too low to prove that the same rate if applied to all classes of freight would result in confiscatory rates. Said this Court:

> "Obviously such a reduction could not be shown to be unreasonable simpy by proving that if applied to all classes of freight it would result in an unreasonably low rate."

In other words this Court held that rates should not be brought to a dead level and that it is unfair to test a rate by the result in case all were brought to the same dead level; and yet, that is what in effect the defendants are seeking to do in this case. Each rate is necessarily governed in a measure by the cost of service. They contend that there is a dead level of cost of service as to freight in North Dakota and *that this dead level of cost should be applied indiscriminately to freight in small packages, the transportation expenses of which are large, and also to bulky freight in carload lots, the transportation expenses of which are very low.* Nor is it any objection to the exercise of the power of reduction of a rate that it may be difficult for the railroad company to show the cost of transporting a particular commodity as distinguished from the cost of transporting freight generally. Said the Court in this case:

> "True, it may be difficult to segregate hard coal in carload ots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the commission, in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low."

The defendants claim that the average cost per ton per mile for *conducting* transportation is 2.236 mills, and they multiply this by two and one-half—the additional cost of the short haul, which gives us 5.59 mills for a haul under one hundred miles. The other item, which brings the alleged cost up to 8.408 mills, consists of a portion of the general operating expenses having no direct connection

with the actual hauling of the freight. But it is of course perfectly obvious that the defendant could haul an enormous tonnage of coal without adding practically anything to these general operating expenses represented according to their figures, by the difference between 8.408 mills and 5.59 mills, or 2.818 mills. But the rate law shows upon its face that the very lowest cost per ton per mile up to one hundred miles is 6.1 mills, or in excess of the mere cost of conducting transportation even on the theory of the defendants themselves.

As already stated, it is obvious that the actual expenses of hauling coal is less than the average expense of hauling all freight. We refer now, not to all the transportation expenses, but merely to the expenses of *conducting* transportation. Into the expense of conducting transportation enter all the terminal charges such as the cost of loading and unloading the freight and the cost of billing it, etc. (Page 55, 56, Record.) The average expense of conducting transportation is fixed by the witness Johnson at 2.236 mills. (Page 57, Record.) If the expense of conducting transportation with respect to coal is only one-half mill less, this would leave that expense 1.736 mills. Multiplying this by two and a half, the additional cost of the short haul in North Dakota according to the theory of the defendants, we obtain as a product 4.34 mills for conducting transportation as to coal in North Dakota on the short haul. The amunt charged up per ton per mile for general transportation expenses is, according to the witness Johnson, 2.818 mills. As heretofore shown, the amount of general expenses fairly attributable to bulky freight in carload lots is much less. If we deduct from this amount, 2.818 mills, one mill, we have the amount of 1.818 mills for general transportation expenses. Adding to this 4.34 mills for conducting transportation as to coal, we have the total expense for

transporting coal per mile, 6.158 mills. This leaves a profit of .242 mills per ton per mile on defendant's own theory. It is true these figures are not supported by any positive evidence. They are merely introduced here for the purpose of showing how slight a change in the railroad company's figures would leave a profit for the transportation of coal at the average legislative rate of 6.49 mils for an average haul of 87 miles.

We call the Court's attention to the following testimony of the witness Johnson and of President Elliot, showing that the alleged cost of carrying a ton of coal a mile in North Dakota is obtained by taking the average cost of freight of all kinds carried in North Dakota, state and interstate, and multiplying one of the factors in that cost, to-wit: the expense of *conducting* transportation, by two and a half.

The witness Johnson testified as follows:

> "Q. That, if I understand you, Mr. Johnson, is the average cost of moving of all freight moved in North Dakota during that year?
>
> A. Yes sir." (Page 54, Record.)

He further testified:

> "As previously stated and explained here before, the average cost per ton per mile for all freight hauled in North Dakota was 5.054 mills and this included 2.236 mills for conducting transportation." (Page 55, Record.)

He further testified:

> "Based on the previous investigation as to the average load carried by way freight trains and branch line trains, to this cost of 5.054 mills I have added 150 per cent of the cost of *conducting* transportation, or 3.354 mills." (Page 256, Record.)

President Elliott testified as follows on this subject. He was asked how the loss of 1.918 mills per ton per miles for

hauling coal in North Dakota on the legislative rate was arrived at and he replied as follows:

> "That is based on taking the average of all your freight in North Dakota and arriving at the average cost in the manner outlined by Mr. Johnson, *and then assuming that your lignite coal would carry its share of that average*, plus these extra items conducting transportation, and calling that the average cost of handling your lignite coal." (Page 70, Record.)

He further testifies about the alleged cost of hauling a ton of coal a mile in North Dakota, to-wit: 8.408 mills, as follows:

> "It is a figure arrived at by taking the number of tons of freight of all classes transported one mile in North Dakota, and dividing it into the total expense incurred in maintaining and operating your railroad in North Dakota. Then there is added to that this estimate for extra cost on the way freight or the branch line freight, lifting the so-called average cost to a higher figure than if you simply charged up against the lignite coal only the average cost." (Page 71, Record.)

The witness John A. Sandberg, testified as follows for the Great Northern Railway Company:

> "Q. What does your statement show to be the cost of conducting transportation per ton per mile of all freight business in North Dakota for the year ending June 30th, 1907?
>
> "A. It shows 2.4 mills.
>
> "Q. And what was the average cost per ton per mile of transacting freight business in North Dakota for that year?
>
> "A. 5.1 mills." (Pages 88, 89, Record.)

He further testifies on this subject:

> "And the operating expenses, as you have made them up for North Dakota, cover the expense of transacting all freight business which moves over the lines in

North Dakota; that is, the cost of the business locallcd in North Dakota, the business beginning in North Dakota and passing into North Dakota, the business beginning in another state and going into North Dakota, and passing clear through North Dakota?

"A. Yes sir, it includes all freight business." (Page 89, Record.)

An analysis of the evidence shows that in the process of multiplying the average expense of conducting transportation by two and a half to secure the added cost of the short haul, the witnesses in no manner took into consideration the fact that the expense of conducting transportation as to coal is necessarily less than the average expense of conducting all freight transportation in the state, but wholly ignored this vital element. They based their conclusion wholly upon the fact that way freights carry so much less tonnage per train as to make this difference in the cost, to-wit: the way freight costing two and one-half times as much as the through freight. The witness Johnson testified as follows on this subject:

"Q. Now, if I understand you, the reason you say it is fair to add that, is that the loading of through freight trains is two and one-half times as heavy as way freights and branch line trains in North Dakota?

"A. Yes sir." (Page 56, Record.)

He further testified as follows on this subject:

"From investigation I have found that main line way freights and branch line freights and mixed trains carry only one-third of the tonnage that is carried in main line through freight trains, and that the main line through freight trains carry two and one-half times as much gross tonnage. I believe, therefore, that it is fair to assume that the cost of conducting transportation in connection with this short haul lignite coal business is at least two and one-half times that of the average for all business.

"Q. Now, why do you say that it is fair to assume that?

"A. On the ground that it costs about as much per train per mile for a way freight or a branch line train as it does for a through freight.

"Q. And the one train carries two and one-half times as much load in North Dakota as the other?

"A. Yes sir." (Page 55, Record.)

President Elliot bases his opinion that the North Dakota short haul costs more than the through haul entirely on the difference of tonnage in the two trains and in no manner makes any allowance for the fact that in the short haul business there is a marked difference between the cost of carrying a commodity like coal and the average cost of all classes of freight.

He says:

"Taking all the elements into consideration, I should say it cost at least twice as much for the conduct of way freight on the main lines and the branch line business as compared with some of your main line through freight business. In other casts, that it costs three and four, and perhaps five times as much as your main line through freight business." (Page 65, Record.)

Here he is merely comparing the cost of short haul with the cost of the long haul. He further says:

"Well, assuming that your way freight has only one-third of the tonnage of the main line through freights, the relative cost would be increased in certain of your items from one to three times over the main line through freight." (Page 65, Record.)

His evidence also shows that the cost of conducting transportation as to the short haul of coal would be from one to three times the cost of conducting the cost of transportation as to the hrough haul. He says:

> "I mean the actual amount that you would pay out for performing the service in hauling your lignite coal or other articles on the branch line would be from two to three times more than it would be on the main line." (Page 65, Record.)

This evidence shows that the comparison with respect to the cost of the two hauls of different lengths *utterly ignores the other necessary classification between bulky freight in carload lots and freight in small packages.*

We regard as fatal the failure of the defendants to carry the proof beyond the cost of carrying a ton of average freight a mile, by showing what the cost of carrying inexpensive freight like coal in carload lots is as compared with such average. Said this Court in *Minneapolis, etc., Ry. Co.* vs. *Minnesota*, 186 U. S. 257:

> "The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots."

See, also, *Interstate Commerce Commission* vs. *Lehigh Valley Ry. Co.*, 94 Fed. 784-786-787.

Indeed, counsel for defendants practically admits that the cost of transporting coal is lower than the average cost of transporting all freight, when the length of the haul is the same. He says, on page 26 of his brief in this Court:

> "Confessedly, coal generally carries a lower rate than the average of all traffic, though it is to be observed, as shown in the record in this case, much depends on the length of the haul."

We call the Court's attention to the fact that the rate law in question, at its close, limits the effect of the law to coal carried in carload lots only. It contains the following proviso:

> "Provided, that the above mentioned rates shall be for carload lots only." (North Dakota Laws, 1907, Chapter 51, page 73.)

In Beale and Wyman—Railroad Rate Regulation, Sec. 597, it is said:

> "A fundamental principle in all classification is that one rate shall be given when the goods are carried in carload lots, and a much higher rate when they are carried in less than carloads. This difference is legally proper. If a carload can be handled as a unit, in loading, transporting and delivering, the cost to the carrier is obviously much less; and furthermore there is no waste through hauling a partly empty car, as much necessarily happen in many cases where less than carload lots are shipped."

As bearing on the proposition that it might have led to a result embarrassing to the defendants if the defendants' proof had differentiated the cost of carrying coal in carload lots from the average cost of miscellaneous freight, we call the Court's attention to the direct evasion of a question along this line by the witness Pennington, when counsel inadvertently entered upon this domain of investigation. The question and answer are as follows:

> "Q. Speaking of the comparison between way freights and through freights, I will ask you a question about coal: Would your opinion be any different as to the movement of lignite on way freights and the general movement of merchandise in North Dakota in the way trains as they are handled?
>
> "A. Why, all the lignite is handled by way freights." (Page 77, Record.)

POINT VIII.

Moreover, this rate of expense of conducting transportation, to-wit: 5.59 mills, which is obtained by multiplying the average rate, to-wit: 2.236, by two and one-half, relates to only an average haul as short as 87 miles, and the evidence is clear that it would not relate to a haul wholly

across one division of the road to another. Said the witness Johnson:

> "By a through freight I mean the freight that may be picked up at one operating division terminal, put into a train and carried to the next terminal." (Page 61, Record.)

He further testified:

> "Q. You would call through freight, then, Mr. Johnson, a train load that was run from Fargo to Jamestown?
>
> "A. Yes sir.
>
> "And through freight would be all through business transported from one division point to another?
>
> "A. Yes, sir—without interruption." (Page 62, Record.)

The Court will take judicial notice that the distance from Jamestown to Fargo is one hundred miles, and this appears upon this record to be the length of a division of the road. Besides, the case contains no evidence relating to a haul as long as 100 miles, but only with respect to a haul of 87 miles; and it appears that for a haul of 100 miles or less, the rate under the law in question is at the lowest, 6.1 mills per ton per mile, and increases continually as the distance becomes shorter until it reaches the very large rate of 30 mills.

Can it be said that a demonstration so incomplete and unreliable as this is sufficient to overthrow a legislative rate, in view of the strong presumption in favor of the legality of the rate, and the heavy burden of proof which the law casts upon the defendants who attack it? It fails to lay the proper foundation and it fails at two points besides; it does not show the cost of an 87 mile haul of coal as distinguished from all freight and it does not show that the cost of a 100 miles haul or over as to any kind of freight is more than the rate in question. Speaking of that burden of proof, this

Court said in *Chicago, etc. R. Co.* vs. *Tompkins*, 176 U. S. 167-173:

> "In approaching the consideration of a case of that kind, we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company, or the legislation of the state must be upheld."

Said this Court in *Willcox* vs. *Consolidated Gas Company*, 212 U. S. 19, at page 41:

> "The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public."

At the same page, this Court further says:

> "The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been an actual experience of a practical result of such rate."

And at page 54 this Court said:

> "Upon a careful consideration of the case before us we are of the opinion that complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the state of New York are in fact confiscatory."

In *San Deigo L. & T. Co.* vs. *National City*, 174 U. S. 750, this Court said:

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to te taking of property for pub-

> lic use without such compensation, as, under all the circumstances, is just, both to the owner and to the public; that is, judicial interference should never occur, unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the court to say that the rates prescribed will necessarily have the effect to dent just compensation for private property taken for the public use."

It is true that the rate in question in this last case related to water supplied by a corporation within a city, but it is obvious that the same principle governs railroad rates that govern such rates as were involved in that case. Indeed, in that very case, this Court stated in so many words, that the principles applicable were the same.

Furthermore, in determining whether the defendants will lose money in transporting coal under the law in question, all of its rates must be considered from the highest to the lowest, according to the distance of the haul. As before stated, a haul of a hundred miles or over is a through haul according to the testimony of the witnesses; and the rate for a hundred miles is 6.1 mills per mile, diminishing gradually up to 200 miles, and at this point the rate is still 4.75 mills. The cost of conducting transportation on a *through* haul is stated by defendants' witnesses to be 2.236 mills. (P. 55 of Record.) This is nearly four mills less than the rate at 100 miles, and nearly two mills less than the rate at 200 miles (Page 101, Record); and as before stated, the general operating expenses would be increased to such a trifling extent by the increase in the transportation of this bulky freight in carload lots that such additional expenses, if any, when apportioned to the number of tons of coal hauled one mile would raise the actual cost but a trifle above the cost of conducting transportation, to-wit: above 2.236 mills.

POINT VIII.

Furthermore, it is by no means decisive of the question to show the state of the transportation business relating to coal under the old rate, for it is entirely reasonable to assume that the effect of the law will be to stimulate the coal business, increasing the *density* of the traffic in that respect and result in long hauls and hauls in train load lots; and in this way the increased cost will come to bear so slight a relation to the increased receipts as to make the rate a remunerative one even assuming that the theory of defendants is correct. If this result does not folow, it will be time enough for the defendants to show this fact after a sufficient time has elapsed to observe the effect of this rate upon the business of transporting coal. See in this connection *Wilcox* vs. *Consolidated Gas Co.*, 212 U. S. 19-54.

POINT IX.

But we go further and claim that the state may, for the purpose of developing one of its great natural resources like coal, require the railroad companies, so far as intrastate commerce is concerned, to carry the commodity below the theoretic cost of carrying the same, provided the rate is not merely nominal and provided they are allowed to earn a fair income upon the value of their investments. The railroads constitute part of the public highway system of the state, and as such are under its control; and the state may prescribe such regulations as in its judgment will conduce to the best interests of the people of the state, so long as the right to earn a fair profit is in no manner affected.

We go further, and claim that so far from subdividing the freight traffic into classes and resubdividing the classes into particular commodities for the purpose of ascertaining the cost of transportation of a single commodity, it is

contrary to sound policy, even to separate the freight and passenger traffic. This appears to have been the view of this Court when *Chicago etc. R. Co.* vs. *Wellman*, 143 U. S. 339, was decided. It is agreed by every one that in making this separation, courts are compelled to make a purely arbitrary apportionment of a large element of the expenses, or in other words, to absolutely guess at the cost of the freight traffic and the cost of the passenger traffic. This guess should not be made, in view of the fact that the railroad companies are afforded full protection if they are permitted to earn a fair profit on their entire business, freight and passenger.

POINT XI.

Another line of consideration sheds a flood of light on the reasonableness of the rate involved. President Elliot testifies that the average cost of transporting freight by the *train load is about $2.00 a mile.* (Page 72, Record.)

Into this cost enters *all the items*, not only the items connected with the actual transportation, but also the indivisible items which are apportioned between the freight and passenger traffic. (Record, page 72.)

The evidence of Mr. Johnson is that it costs practically the same, so far as the actual transportation expenses are concerned, to haul a way freight of lighter tonnage as it costs to carry a through freight train with heavier tonnage. (Pag 55, Record.) But the actual cost of conducting transportation as distinguished from the all operating expenses is less than one-half of such operating expenses. Mr. Johnson himself states that Exhibit "C" shows that while the average cost which included all items is 5.054 mills per ton per mile the average cost of actually conducting transportation is only 2.236 mills, or about 40 per cent. of the whole cost. (Page 55 of Record.) According to this figure, in-

asmuch as the total cost of the freight traffic upon a way freight in North Dakota is $2.00 per train per mile, the total cost for *conducting* the transportation is only about 80c per train per mile. This figure cannot be raised to a higher amount on the ground of any difference between the expenses of a long haul and the expenses of a short haul, because that relates to the expense per *ton* per mile and we are now dealing with the expense per *train* per mile, and as before stated, the evidence shows that so far as *conducting* transportation is concerned, the expense per train per mile is practically the same on the way freight as on the through freight.

Mr. Peake testifies that the average carload of the coal is twenty-five tons. With only twenty cars in a train, this would make the train load five hundred tons. Carrying this train 100 miles at the rate of 80c per train per mile for actual transportation expenses, would cost $80; but the rate under this law, for 100 miles is 61c a ton, or a total freight rate of $310. Applying these figures throughout the extent of this rate law, we have the following results:

Cost for 200 miles, $160; Receipts at 95c a ton------$475
Cost at 300 miles, $240; Receipts at $1.19 a ton------$595
Cost at 400 miles, $320; Receipts at $1.44 a ton------$720
Cost at 500 miles, $400; Receipts at $1.69 a ton------$845

These figures show a very large earning over the actual cost of conducting transportation, but they are much too favorable to the railroad company, because it is undisputed that into this cost of conducting transportation there enters terminal charges. (Page 58, Record.) But coal has practically no terminal charges for the reason already set forth. Hence the actual cost of transporting a train load of coal a mile is much less than 80c, which is the actual cost of transporting a train of miscellaneous freight with respect to a portion of which there are termina charges.

POINT XII.

As bearing upon the reasonableness of this rate, other considerations are entitled to great and, indeed, controlling weight. There is an elementary rule governing freight rates that the ratio of the value of the freight transported, to its weight and bulk, should be a factor. If the commodity possesses little value in relation to its bulk and weight, a lower freight charge is demanded by the very nature of the case, for otherwise the transportation charge might constitute several times the value of the article transported. Of course, this is not the only element to be considered, but it is entitled to full weight.

Said Commissioner Schoonmaker in *Thurber* vs. *N. Y. C.*, 3 I. C. C., Reports 473:

> "The cost of service, while recognized as an important element in classification and rates, is not alone controlling. On that basis some articles, on account of relation of commercial vaue to cost of service, though furnishing a large volume of traffic, would not be carried at all, and others of high commercial value would have a very low rate without increasing tonnage.
>
> "Another element of the highest importance, and that cannot be disregarded, is the value of the service to the article carried. This is a factor that largely determines the classification and rates the article will bear in the transactions of commerce, and necessarily quaifies the influence of other factors in the distribution of charges with the view to average reasonable revenue."

In Beale and Wyman, Railroad Rate Regulation, Sec. 595, it is stated:

> "But if the value of the goods is very low, this fact will tend to reduce the classification, because the value of transportation to the shipper will thereby be reduced." Citing *Tift* vs. *Southern Railroad*, 10 I. C. C. Reports, 548.

In Section 596 it is said:

"The value of articles most strongly affects determination of rates for their transportation in that the value of the service to the shipper is generally greater upon the more costly products."

Indeed, Commissioner Morrison, in *Cox Bros. and Company* vs. *Lehigh Valley Railroad*, 4 I. C. C. Reports, 535, justified a difference of rates with respect to bituminous coal on the one hand and anthracite on the other, the basis of the difference being the greater value of the anthracite coal. He said:

"The grounds upon which we are asked to find these two coals to be the same freight, a like kind of traffic, is that they are loaded, unloaded and transported in the same way and substantially at the same expense to the carrier, though one-half or more of the anthracite is used for domestic purposes.

"Ordinarily there is no better criterion for reasonabe charges than that which is in proportion to the service rendered; and if the cost and expense of the carrier was the only test of a reasonable charge the claim might well be made that all coals should be classed together as one freight and be subject to the same transportation charges.

"Carriers in making separate classifications, or rates for different coals, take into consideration not only the expense of transportation, but the value of the freight and worth of the transportation to the shipper; the exceptional qualities which fit the more valuable anthracite for domestic and special uses and cause its large consumption in less distant markets."

It appears from the evidence that lignite coal has less commercial and less fuel value than bituminous and anthracite coal, and the witness Peake in testifying to this effect also states tersely the ground of criticism of the old rate on lignite coal and the justification for the rate which is involved. He says:

"The causes are the fact that lignite is essentially a

lower grade of fuel than the bituminous coals of Pennsylvania and the anthracite of the same section; the fact that the lignites carry a larger percentage of moisture than the coals mentioned and lose more in shipment by evaporation than do these coals; the fact that the competition of the eastern coals in our territory is very great, and that the freight rates do not take into consideration, in my judgment, the difference in the value, actual and fuel, of the two classes of coal; that is, the present freight rates that the several railway companies have in force now. I mean the freight rates the several railway companies have in force, and not the rates as prescribed by the laws of 1907." (Page 107, Record.)

That the old rate upon lignite coal was so high as to preclude its competing beyond a narrow range within North Dakota with more valuable coal shipped from without, is demonstrated by the undisputed facts in this case. The record shows that the deposit of coal in the western part of North Dakota is practically inexhaustible. Mr. Peake says:

"My conclusion therefore is that the fuel supply of lignite coal in North Dakota available for mining is so great as to be practically inexhaustible." (Page 109, Record.)

According to his testimony he has been in the coal mining business in North Dakota since 1897. (Page 103, Record.)

The record shows that there are other mines in operation and that many persons have at different times engaged in this business, and yet what has been the result? According to the evidence of Mr. Pennington, General Manager of the Soo Road, practically all persons who have engaged in this business have made a failure of it. (Page 84, Record.) The paralyzing effect of the old rates upon this industry is shown also by the small output, the total number of tons carried during an entire year by all three of the railroads involved in this case being only 204,000 tons. (Pages 78, 94 to 96-100, Record.) And some of this tonnage may be

duplicated by reason of the same car being transferred from one of these roads to the other in transit.

We discover how far this coal has been able to reach the people of the state from the undisputed evidence that the average haul on this coal was last year only 87 miles. (Page 55, Record.) The witness Peake says:

> "The demand is very largely a local demand close to the mines." (Page 106, Record.)

The witness Cahill states clearly the effect of the old rate upon the lignite coal industry as follows:

> "It has the effect that eastern coal substitutes or rather takes the place of ignite coal in a considerable portion of the state and reduces very largely the output of lignite coal. (Page 116, Record.)

The witness Lloyd says of the rate:

> "It puts prices of lignite up so high people won't use lignite." (Page 123, Record.)

On cross examination of this witness counsel for defendants kindly furnished us with more evidence on this point, as follows:

> "Q. Of course, if lignite coal possessed the same fuel value that the eastern bituminous coal possesses, you wouldn't have any trouble in very largely increasing your sale of lignite coal in this state, even under existing rates, would you?
>
> "A. Oh, no.
>
> "Q. And the inherent difficulty that you have to contend with as a miner of coal is the fact that your product doesn't possess the same value as fuel that the coals that come in competition with you possess? Isn't that true?
>
> "A. Yes sir." (Page 123, Record.)

We obtain a true picture of the fatal effect of the old rate upon the development of the lignite coal industry throughout the state from the fact that the rate drives the

lignite coal out of the largest part of the state through the competition of bituminous and anthracite coal. As before stated, the average haul from the mine is only 87 miles, but the record shows that there are mithin the state many hauls of over 300 miles, and some even as high as 500 miles. (Pages 26 to 45, Record.)

A fact not to be ignored is that this coal deposit is confined to the western portion of the state. (Page 106 Record.) To enter the Red River Valley weighted down with the old rate was impossible in the face of the competition from the more valuable fuel from the east.

Mr. Peake, who is thoroughly familiar with the situation in the state with respect to lignite coal, testified that in his opinion if the rates involved were put in force it would tend greatly to increase the use of lignite coal in mills and other manufacturing plants in North Dakota. (Page 108, Record.) The development of this great natural resource is of the most vital importance to North Dakota. It is wholly without other fuel supply, being practically destitute of timber. The consumption of anthracite and bituminous coal takes from the state large sums of money which would be spent in the state if the people were, by reason of cheaper freight rates, able from an economic standpoint to purchase lignite coal,—their own product. Moreover, with the question of cheaper fuel is indissolubly bound up the problem of the development of other great natural resources in the state by building up manufacturing enterprises. Another consideration justifying very low rates on lignite coal is the insignificant ris kwith respect to damages which the railroads incur in transporting it. In *Dennison L. & P. Co. vs. Missouri, etc., Ry. Co.*, 10 I. C. C. 337, Commissioner Prouty said:

> "Coal is among the most desirable kinds of traffic. The reasons for this have been several times stated by

the Commission and need not be repeated here in detail. The cost of receiving, transporting and delivering that commodity is less than in case of almost any other article of freight. Its value is not great, the hazard of loss in transit is insignificant, it is an article of universal necessity in daily life, and as a steam fuel it furnishes the basis of many other industries."

POINT XIII.

We call attention to the evidence that the lowering of the rate will so stimulate the business as to probably lead to the transportation of the coal in train load lots. (Page 113, Record.) Indeed, it appears that some of it is being shipped in train load lots. The witness Cahill says:

> "During the past three months we have shipped practically train load lots, considering that a train was thirty cars." (Page 114, Record.)

Moreover, it appears that the railroads themselves make the practice of holding cars until they obtain enough to make a train load in connection with other freight. The witness Cahill said:

> "They are sometimes held to the extent of holding fifteen or twenty cars there for them to haul in a bunch, whereas we bill them out from day to day in smaller proportion." (Page 118, Record.)

Transportation in train load lots is a probability. It is even an existing fact on a small scale, and the railroad companies who make so loud a cry about this rate, are themselves handling some of this coal in a way to approximate the handling of it in train load lots. The witness Martin, who is general traffic manager of the Soo Line, testified as follows on the subject of the cheaper cost of transporting freight in train load lots:

> "Q. As a matter of fact, Mr. Martin, if you can transport your freight of one kind in train load lots, it

can be done at a lower rate than where it is being shipped locally, as you state?

"A. Oh, yes; that is well admitted.

"Q. This is one of the principal items that goes to figure up the cost of transportation?

"A. Yes sir." (Page 85, Record.)

It is a sound principle of law that the courts have a right to consider the probable future consequences of a cheaper rate in increasing business and thus reducing the relative cost of doing such business. Said Mr. Justice Brewer, in *Chicago, etc., Ry. Co.* vs. *Wellman*, 143 U. S. 339, at page 343:

> "May it not be possible, indeed, does not our experience suggest the probability that a reduction of rates would increase the amount of business and therefore the earnings?"

In this connection we call the Court's attention to another well known principle, namely, that an increase in the volume of business by no means involves a proportionate increase in the expense, because certain items of the operating expenses are not affected at all, or very slightly, by the increased traffic. This is the well known principle that the relative cost decreases as density of business increases. This is fully recognized by the witness Johnson. (Page 59, Record.) In Beale and Wyman Railroad Rate Regulation, Section 513, it is said:

> "It has been pointed out, however, in all discussions of the railroad problem by economists that the fixed expenses, which constitute so considerable a proportion of the disbursements by a railroad, are to a very large extent independent of the amount of its traffic carried. Therefore additional business will always be done at a decreasing relative cost. The net income rises as the business expands, and the law of increasing returns is again demonstrated."

And in Section 478 it is said:

"As the volume of traffic increases the particular rate tends to diminish. All fixed charges, and other expenses (like station expenses, salaries, and even to a certain extent wages, which are the same whether much or little freight is carried), must be paid largely out of the freight rates, and the greater the traffic, the less each separate article must bear. It is a general principle, therefore, that a large volume of traffic tends to lower the particular rate. This fact is the basis of a theory sometimes held, which may be described as the law of increasing returns. Traffic to a certain amount is necessary, at a given rate, to pay fixed charges and operating expenses; when that amount of traffic is obtained, further shipments will net a profit even if they pay a low rate."

POINT XIV.

Another settled principle sheds direct light on the case. One of the great reasons for a lower rate on a long haul than the rate on a short haul is that the terminal charges enter into the rate as a very important feature. These terminal charges are the same whether a train is carried five miles or a thousand miles, but whether they are carried five miles or one thousand makes a radical difference in the cost per mile. As is said in Beale and Wyman Railway Rate Regulation, Sec. 622:

"The reason for this rule is that the cost of railway transportation is made up of the expense of the two terminals and the intermediate haul, and the terminal expenses are the same whether the haul be long or short. A few miles, or even a considerable number of miles, of additional haul may in some instances of long distance transportation be practically of very little importance, and the aggregate rate therefore may be very little affected by the additional mileage."

This rule shows how *largely* terminal charges enter into actual cost of transportation; but coal has practically no

terminal charges and it is utterly fallacious to apply to the transportation of such a commodity, as has been done in this case, the same average cost as is applied to all freight, a portion of which consists of freight upon which there are terminal charges more or less large.

In asking this Court to hold that coal must bear, in North Dakota, the same share of the average cost of transporting all freight in that state is, as already stated, to fly directly in the face of the decision of this Court in the Minnesota case. The language in *Colorado F. & I. Co.* vs. *Southern Pacific Railroad*, 6 I. C. C. Reports, 489, is pertinent in this connection.

> "Rates on steel rails and other low grade freights of the character stated, yielding per ton per mile the average received on all freight, would be unjust. The value of the goods, the cost of the service, the degree of risk to the carrier, among other considerations, have important bearings upon the relation of rates on different kinds of traffic, as well as the reasonableness of the rate on a specific article."

POINT XV.

The whole basis of computation in this case is the expense of conducting transportation. Transportation expenses are divided in Exhibit "C" into two parts. One embraces the expenses of *conducting* transportation and the other includes all other expenses. The defendants claim that the expense of conducting transportation with respect to a short haul of 87 miles which they claim is the average haul of lignite coal in North Dakota) is 2½ times the expenses of conducting transportation with respect to the long haul and they therefore multiply the expense of conducting transportation by 2½ and to this product they add the other expenses. This expense of conducting transportation they claim is 2.236 mills per ton per mile. Multiplying this by

2½ gives 5.59 mills per ton per mile. Adding to this the cost per ton per mile for other expenses, to-wit, 2.818 mills, we reach their total cost of 8.408 mills per ton per mile for transporting coal in North Dakota. But no foundation is laid in the evidence for any finding that the general cost of *conducting transportation* in North Dakota per ton per mile is 2.236 mills. The only allusion to this matter is in two places in the record. In Exhibit "C" it is stated that in the cost 5.054 mills per ton per mile—"There is included for conducting transportation 2.236 mills." (Page 99, Record.) The witness Johnson who made this Exhibit "C," merely repeats the words of this Exhibit at page 55, Record, as follows: "And this included 2.236 mills for conducting transportation." Referring to this exhibit he merely speaks of it as containing some calculations and views of his own in regard to the reasonableness of proposed North Dakota rates. (Page 54, Record.) He nowhere explains to us how this item of 2.236 mills for conducting transportation was arrived at. So far as this record shows it may be a rough guess of the witness. He does not even take the trouble to swear that according to his best knowledge and belief this item, or any of the statements contained in Exhibit "C" are true. All he pretends to do is to give his conclusions respecting the rates involved by using this exhibit as a basis. Again we invoke the principle that in view of the fact that the process of proving the cost per ton per mile is beset with many difficulties and the result is always more or less of a guess, the railroad company should always be required to start with data susceptible of accurate knowledge and exhibit to the Court the process of demonstration from the known data to the final conclusion and also furnish the Court with evidence that this process is the very best of which the case, in its nature, admits.

It is to be noted that the witness Johnson who prepared

this statement nowhere testifies to the accuracy of any of his computations but merely says that Exhibit "C" embraces some calculations he made, a statement entirely consistent with their having been made in an unscientific and purely partisan manner and not with the view to ascertaining the truth. Nor does he anywhere in his oral testimony testify that the amount of 2.230 mills for conducting transportation is a correct amount, but merely states it as a figure which he had previously incorporated in this paper, Exhibit "C," containing his calculations.

Is it possible that the foundation for the overthrowing of a rate law may be a figure of cost which a railroad official merely states represents his calculation that he has made on the subject? In this connection we again call the Court's attention to the fact that while the witness swore to the accuracy of Exhibits "A" and "B" according to his best knowledge and belief, no such testimony from him with respect to Exhibit "C" can be found in the record.

POINT XVI.

The case really involves the question of rate classification. The rate in this case is a real and substantial rate and not a merely nominal one. We are therefore in the field of classification. Two main factors always enter into this question, namely: The cost of transporting the particular commodity and what rate the commodity will bear. Each of these questions is extremely complicated in nature and they are eminently questions for a legislative or administrative body to settle. Therefore, nothing but the clearest proof that the body fixing the rate has acted arbitrarily in passing on these questions should warrant a Court in holding the rate illegal. It is well known that the rate upon one commodity may be a great deal less than the rate upon another, on the ground of a difference in cost of service. That is to

say, a rate of five mills per ton per mile on lumber might produce as large a profit as a rate of twenty-five mills per ton per mile on another commodity. But railroad commissions in dealing with rate classification may, in addition, consider what the commodity will bear and may legitimately relieve the cheap commodity from bearing more than an extremely small fraction of the profit burden and throw a correspondingly larger burden on some other commodity in way of compensation. It is illogical to speak of this as robbing Peter to pay Paul. It is neither more nor less than a case of proper rate classification with the incidental result that one commodity sustains a greater weight of expense than another. On principle there is no reason why the theoretic cost of service should furnish a rigid line below which a rate can never be fixed. If the article will not move freely except at a rate below theoretic cost of service, the case is one where the general public good requires such a rate and no substantial damage is done to the Railroad Co. thereby so long as it is earning from all its intrastate business a fair revenue on its investment. These views have peculiar force in a case like the one at bar where it is clear that the rate will pay the actual cost of moving the freight. It is certainly no arbitrary stretch of power for the sovereign to declare, with respect to a particular commodity, that all the burden of transportation charges it ought to bear is the actual cost of moving that commodity, leaving other commodities which are better able to stand the burden to pay a sufficiently heavier rate to make up its share of the general expenses and its share of the profits.

The Railroad Commission of Wisconsin, a very able body, has clearly intimated that it might deem it proper and just, in a particular case, to fix a rate at less than the cost of service. In re Rates on Milk and Cream, 2 Wis. R. R. Com. Rep. 450, that Commission says at page 465:

> "Generally speaking, no rate should be lower than sufficient to cover operating expenses and to contribute at least a small amount toward the interest upon the investment. There are perhaps conditions under which exceptions to this may be warranted, but they should not be numerous or general."

Said that Commission in re Rates on Pulp Wood, 2 Wis. R. R. Com. Rep. 168 at pages *227* and *228*:

> "The cost of the service to the carriers as stated above is the first and most important element to be considered in rate making. But, while all this is true it is also a fact that this cost cannot often be strictly adhered to or used in fixing rates without certain modifications such as are accasioned by the consideration that should be given to the value of the article and to other factors."

If the rate making power may ever fix a rate on a commodity below the point of its bearing its full share of the operating expenses, then the presumption is that the Legislature in fixing the rate in question, proceeded on the theory that this rate was necessary to make North Dakota coal move freely and the burden is on the defendants to show that such is not the fact.

Not only have the defendants failed to overthrow this presumption, but the undisputed evidence conclusively establishes that North Dakota coal would not move freely under the higher rates in force at the time the rates in question were fixed by the legislature.

POINT XVII.

There is no force in the claim that the rates involved are shown to be unremunerative by the fact that they are less than the rates on coal in other states. Comparison with other rates is useless unless it is first established what income over expenses the other rates are producing. To

illustrate, the legislative rate in North Dakota may in fact produce a profit of one mill per ton per mile. Conditions may be so favorable to cheaper transportation in Illinois that the same rate there would produce a revenue of two mills a ton per mile. But, Illinois may deem it wise policy to make the rates on coal in that state so high as to earn four mills a ton per mile. Such rates would, of course, be higher than the North Dakota rates. But this would prove nothing favorable to the defendants. In such a case we would have a higher rate in Illinois and in addition conditions there more favorable to a lower rate; and yet this would not establish that the North Dakota rate was unremunerative, for the reason for the difference in the rates in the two states would be owing to the fact that the policy of Illinois with respect to coal rates, was different from the policy of North Dakota. The fallacy of the whole argument based on the higher rates of the other states with respect to coal is that it ignores the fact that states may differ in their classifications of commodities for purposes of rate regulation, and that higher rates in these other states may be owing to the policy of these states that coal transportation should pay a relatively larger profit. If there was any evidence that coal was being carried in these other states at cost, or less than cost, then it might be proper to push the inquiry further and ascertain whether the conditions in these foreign states were such when compared with the conditions in North Dakota as to justify the inference that the low rates in North Dakota must be less than the cost of transportation. But, so far as we know, the coal rates of these other states will produce a large profit.

The witness Post, upon whose evidence these foreign rates stand on this record, testified as follows:

> "Q. You don't know of your own knowledge whether the rates given in the reports from which you

compiled Exhibit "4" were reasonable or unreasonable?

"A. No, sir.

"Q. You have no knowledge of the fact whatever?

"A. No, sir." (Page 22, Record.)

The situation is ambiguous and insmuch as the defendants have the burden of proof they cannot use the foreign rates as evidence as to the unreasonableness of the domestic rates, without clearing up the ambiguity by competent evidence. It would be a highly dangerous doctrine that after one state had passed a rate law, each rate in which was in fact remunerative, another state could cover the same field with a law embodying higher rates and thus according to the theory of the defendants in this case furnish the railroad companies with a prima facie case against the rates in the first named state on merely showing the existence of such foreign rates and that the conditions controlling cost of transportation in the two rates were the same.

Said the Supreme Court of North Dakota in this case:

> "Not a scintilla of proof which is offered to show that such foreign rates are reasonable."

In *State* vs. *Minneapolis, etc. Ry. Co.*, 80 Minn. 191, the Court said:

> "Counsel for defendant claims something for testimony as to rates received by other roads for this class of service, and by comparison asserts that the tariff complained of is too low. This method of ascertaining the reasonableness of the tariff is valueless because it may be that the other roads are exorbitant in their charges. That another road is receiving, say, one dollar per ton for carrying coal one hundred miles while defendant receives but seventy-five cents for the same distance, may prove that the other road charges too much, and should be looked after by the Commission; but this kind of evidence does not demonstrate that defendant is receiving too little, and that the commission has fixed an unfair and unreasonable tariff of rates on its line."

Said this Court in *Smyth* vs. *Ames*, 169 U. S. 540:

> "Comparison, therefore, between the rates of two states are of little value unless all the elements that enter into the problem are presented."

One of the vital elements that enter into such a problem is whether the foreign rate which is used as a means of proving the domestic rate to be too low was a merely reasonable rate or whether it was not in fact a rate producing a large profit.

It is unwise policy to establish a doctrine that a comparison of rates may be resorted to when a rate established by law is being attacked. As before stated the comparison is of no value unless the evidence shows the relation of the foreign rate to the cost of transportation there; and it is absurd for the courts to undertake all this investigation as to the foreign rate only as a stepping stone to the investigation of the domestic rate. Besides the foreign rate is not helpful in the sloution of the problem even if this investigation as to such rate has been made, except in connection with the comparison between the cost of transportation in the two states; and in making this comparison the Court will find itself on a shoreless sea of speculation. In what respect and to what extent the conditions affecting cost of transportation in the two states are the same and wherein they differ is a subject upon which it is possible to secure every shade of opinion.

POINT XVIII.

Moreover, even if the rates of the other states in connection with the evidence as to comparative cost of operation in these states and in North Dakota had some tendency to prove the North Dakota rate unremunerative, such evidence could by no means be regarded as conclusive and the de-

cision of the Supreme Court of North Dakota on that question of fact is final so far as this Court is concerned.

Chrisman vs. *Miller*, 197 U. S. 313, and cases cited.

See also:

Seaboard Airline vs. *Florida*, 203 U. S. 261.
Atlantic Coast Line vs. *Florida*, 203 U. S. 256.

President Elliot does not state whether he has included in his testimony all of the elements affecting the cost of transportation in comparison between North Dakota and the foreign states where the rates are claimed to be higher. (See his evidence on this point, pages 74-75 of the record.)

Nor is the evidence of the witness Martin any more satisfactory on this point. (Page 82-83, Record.)

POINT XIX.

The point made in the Supreme Court that the rate in question is in effect a regulation of interstate commerce needs no other answer than a reference to the repeated decisions of this tribunal.

Louisville, etc. R. Co. vs. *Kentucky*, 183 U. S. 503, and cases cited.

POINT XX.

The case of *Interstate Commerce Commission* v. *Stickney*, 165 Fed. 638, is not an authority in favor of the defendant. The case presented merely this question of law, to-wit: Whether the Interstate Commerce Commission had power to correct an excessive through rate by reducing the terminal charge for carrying the car from the end of the line to the Union Stock Yards in Chicago. The Court merely held that under the act of Congress this terminal charge must stand upon its own merits, and it being conceded that the reduction of the rate was below the actual cost of the

service, the Court held that the order reducing the rate was beyond the power of the Commission. It was not a case where other reasons could be urged to justify a rate below the cost of service, as it appeared that the only reason for the reduction was that the Commission was trying to accomplish by indirection that which it had no power to accomplish except by a direct attack upon the through rate itself. Said the Court in that case:

> "For our present purposes it is sufficient to say that it stands conceded by the pleadings that the actual cost to complainants of carrying live stock from their respective terminal yards at the ends of their lines or roads in Chicago to the Union Stock Yards exceeds the sum of $2 per car. This expenditure is for trackage from the ends of their rails over the track of the Union Stockyards & Transit Company and making deliveries of the stock at the stockyards, and is for a service totally distinct and separate from their rails. As such terminal service, it was required by the original interstate commerce act (Act Feb. 4, 1887, c. 104, Sec. 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), and by the amended act (Act June 29, 1906, c. 3591, Sec. 2, 34 Stat. 586 [U. S. Comp. St. Supp. 1907, p. 895]), that it should be separately scheduled by the carriers. * * * * * * * * *
>
> "Neither the commission in its report nor learned counsel in their argument attempt to justify the reduction on the ground that the charge as actually laid was too much for the particular service rendered, but solely on the ground that if the charge of $2 a car for the terminal service should be allowed, even though it be only a just and reasonable compensation therefor, the result would be that the rate from the origin of shipment to the ends of the rails in Chicago would become too high, and thereby the cost of transportation from the origin of shipments to the Union Stockyards would be excessive. * * * * * * * * *
>
> "The various provisions of the interstate commerce law requiring separate statements and schedules of

all kinds of service and imposing penalties for failure to observe them seem to us to necessarily place them apart and make each stand by itself when assailed as unlawful. This, of course, does not prevent consideration of all pertinent surrounding circumstances when any particular service is drawn in question.

"It follows, we think, that the reduction of the terminal charge below its cost, or below its just and reasonable value, for the purpose of correcting the through rate, was erroneous. The commission, in our opinion, had no power, after the legal separation of the two services, to make the terminal charge unreasonably low, merely because the tariff for the through rate was unreasonably high. If the latter were true, the remedy was to reduce it by a direct proceeding instituted for that purpose, rather than by the indirection involved in reducing the charge for another connecting, but separate, service which was just and reasonable in itself. On the conceded facts of this case we think the commission misconstrued the law.

* * * * * * * * * *

"Applying the foregoing doctrine to the facts in this case, we think the learned commission fell into a mistake of law in attempting to correct the through rate by reducing the terminal charge itself below its just and reasonable value. That being a separable and separate service, actually segregated by proper action of the carriers from the rate over their main lines, it must, in our opinion, stand or fall upon its own merits, irrespective of whether the other rates are in themselves just and reasonable. If they are not just and reasonable, appropriate proceedings should be instituted to make them so."

This very case fully sustains our claim that when the reasonableness of a single rate is being considered other matters than the mere cost of service may properly be considered. The Court said:

"This, of course, does not prevent consideration of

> all pertinent surrounding circumstances when any particular service is drawn in question."

And the same doctrine is recognized in the other case cited by counsel for defendants, *Mo. Kan. Tex. R. R.* v. *Interstate Comm. Commission*, 164 Fed. 645, where the Court say:

> "To be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public."

We are at a loss to discover anything in the opinion of Justice White in *At. Coast Line R. Co.* v. *N. C. Corp. Comm.*, 206 U. S. 1-25-26, which in the least sustains the defendants. The matter there stated was simply stated by way of argument, for the substance of it is merely this: The Court does not decide that a rate *below* cost of service is unreasonable, but says that, assuming that such a rate is unreasonable as a matter of law, nevertheless such rule of law has no bearing on the case *before* the Court.

RECAPITULATION.

To recapitulate our argument we make the following points:

I.

Full ownership of property which exists when there is no trust embraces both the legal and the equitable title.

II.

Such is the ownership of railroad property by railroad corporations.

III.

But, such ownership by railroad corporations, whose business is affected by a public interest, is not *absolute* as in the case of private ownership, pure and simple.

IV.

So far as the equitable title is concerned a railroad corporation has a right to earn a reasonable income upon the value of the investment, but no more. To this extent its equitable title is limited in scope.

V.

But in the case at bar it is not claimed that the rate in question invades this right to earn a reasonable income. Indeed, it is entirely consistent with this record that the defendants are earning on the North Dakota business an excessive income.

VI.

It follows that if there is any invasion of defendants' constitutional rights it is through an attack upon the legal title or the right of control.

VII.

But this right of control or legal title is subject to reasonable regulation, the same as the equitable title.

VIII.

In determining whether the rate in question is a reasonable regulation of the right of control the question that arises is: what are the factors that enter into the solution of such problem?

IX.

Defendants claim that the decisive factor is the cost of service and that the rate in question is shown to be less than such cost.

X.

The State claims that the cost of service is only one factor and that the question may be controlled in a particular case by other considerations.

XI.

The consideration which we claim control it in this case are the relatively low value of the commodity to which the rate relates and that because of such low value and that the fuel value of lignitecoal is much less than the fuel value of anthracite and bituminous coal, lignite coal cannot be moved in North Dakota except on a small scale and for a short distance without a reduction of the rate.

XII.

The rate in question is not merely nominal but substantial in character and the question therefore is a question of fact whether the rate is a reasonable one in view of all the elements that enter into such question. That question having been settled by the Legislature, and the rate having been sustained by the Supreme Court, this Court will not disturb

the findings of both branches of the State Government that the rate is a reasonable one.

XIII.

Morecver the rate is a reasonable one without any reference to the findings of both branches of the State Government on the question.

XIV.

On defendant's own theory the rate in question is greater than the cost of conducting transportation.

XV.

Defendants have wholly failed to show clearly by competent evidence that the rate in question is in fact less than the cost of service.

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